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AN
ESSAY
On the Learning of
Francis Maserne
CONTINGENT REMAINDERS
AND
EXECUTORY DEVISES.

In this TREATISE the Doctrine of the Judgment delivered by the Court of King's Bench in the Case of PERRIN *versus* BLAKE, (since reversed in the Exchequer Chamber, which Reversal is now before the House of Lords), and the principal Authorities for and against it are fairly considered.

N. B. In this Edition the general Grounds of that Judgment are more fully entered into and examined.

By CHARLES FEARNE, *X*
Of the INNER TEMPLE, CONVEYANCER,
Author of the LEGIGRAPHICAL CHART of LANDED PROPERTY
in ENGLAND.

Scire autem proprie est, rem ratione et per causam cognoscere.

The second Edition greatly improved and enlarged, by the Addition of many useful Cases, Distinctions, and Explanatory Observations.

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M,DCC,LXXII.

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Y A S S E

CONTINGENT REMAINDERS

EXECUTORY DEVIATION

continued.

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10. The same person for the same purpose.

The report, which was approved and adopted by the Association of
many local Clubs, Districts, and Executive Committees,
was the basis of the plan.

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M.DCC.LXXII.

T O T H E R E A D E R

which he now does to inform them, that the
very favourable manner in which his at-
tempt has been received by the publick, has
 encouraged him to bestow very considerable
 pains, in improving and opening it into a
 more expanded and useful manner. The addition
 of such cases, distinctions, and explanatory
 observations, as he judged would render
 it more accurate, complete, and useful.

T O T H E
 R E A D E R.

WHEN the author first sent this
 essay to the press, he was not
 without his doubts as to its reimburs-
 ing him the expences of its publica-
 tion. The very abstruse nature of the
 subject (whatever might be the mode of
 treating it) lead him to consider every
additional page as an additional obstacle
to its sale. He therefore repressed his
 inclination to be more explicit, and con-
 fined himself within the narrowest li-
 mits, to which the nature of his plan
 could be reduced. The event however has
 disappointed his fears ; and his ambition
 is gratified, in the unexpected occasion of
 addressing his readers a second time :

TO THE READER.

which he now does to inform them, that the very favourable manner in which his attempt has been received by the publick, has encouraged him to bestow very considerable pains, in improving and opening it into a more expanded compass; by the addition of such cases, distinctions, and explanatory observations, as he judged would render it more accurate, complete, and useful.

Inner Temple Lane,

November 1772.

THE

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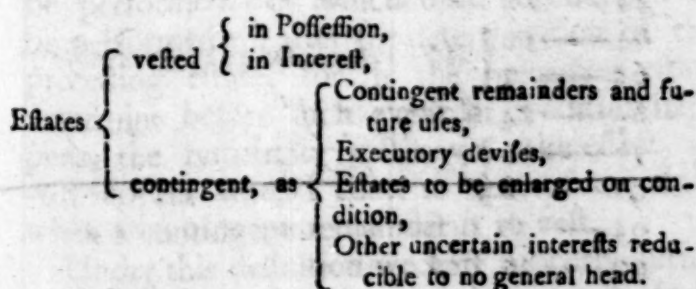
The A U T H O R particularly requests the
attention of the Reader to the follow-
ing Corrections.

Page	Line	
17	2	after <i>heirs</i> insert <i>Special</i>
48	29	for <i>will</i> read <i>would</i>
64	12	} after <i>remainder</i> read <i>by devise</i>
65	3	
65	24	strike out <i>of</i>
77	33	} for <i>B.</i> read <i>A.</i>
92	8	
94	30	before <i>occupancy</i> read <i>general</i>
99	36	strike out <i>at</i>
106	32	for <i>as</i> read <i>at</i> ; for <i>seoffees</i> read <i>trustees</i>
120	21	for <i>A.</i> read <i>B. who is then living</i>
146	14	for <i>A.</i> read <i>wife</i>
	24	after <i>event</i> insert <i>of</i> .

A contingent estate is where a right is to
accrue upon an event which is dubious
and uncertain.

INTRODUCTION.

WHEN we consider estates with regard to the certainty and the time of the enjoyment of them, we may distinguish them into



An estate *vested* is where there is an immediate fixed right of present or future enjoyment.

An estate *vested in possession* is where there exists a right of present enjoyment.

An estate *vested in interest* is where there is a present fixed right of future enjoyment.

A *contingent estate* is where a right is to accrue upon an event which is dubious and uncertain.

The most considerable of the estates which fall under the last description are *contingent remainders*, and *executory devises*, the proposed subject of the ensuing sheets.

A CONTINGENT REMAINDER defined, and its several Kinds distinguished, &c.

A Contingent Remainder is a remainder limited so as to depend on an event or condition which may never happen or be performed, or which may not happen or be performed till after the determination of the preceding estate, for if the preceding estate determine before such event or condition happens, the remainder will never take effect, as will appear when I come to treat of the time when a contingent remainder is to vest.

Under this definition we may properly distinguish four sorts of contingent remainders.—*First*, Where the determination of the preceding estate is itself dubious and contingent.—*Secondly*, Where the condition on which the remainder is to take effect, is independent of the determination of the preceding estate.—*Thirdly*, Where the condition upon which the remainder is limited is certain in event, but the determination of the particular estate may happen before it.—*Fourthly*, Where the person to whom the remainder is limited is not yet ascertained or not yet in being.

B²Fir²

3 Rep. 20.

First, Where the determination of the preceding estate itself depends on an event which may never happen; as if *A.* make a feoffment to the use of *B.* till *C.* returns from *Rome*, and after such return of *C.* then to remain over in fee, here the particular estate is limited to determine on the return of *C.* an event which possibly may never happen, and therefore the remainder which depends on such contingent determination of the preceding estate is dubious and contingent.—

Poph. 97. Arton v. Hare.

So where a fine was levied to the use of *A.* and the heirs-male of his body, until he or the heirs-male of his body should have done such a thing, and after such a thing done, to the use of *B.* in tail, *A.* died without issue, and without performing the condition, and it was adjudged the remainder was contingent, and never took place.

3 Rep. 20.

Secondly, Where some uncertain event unconnected with and collateral to the determination of the preceding estate is, by the nature of the limitation, to precede the remainder; as if a lease be made to *A.* for life, remainder to *B.* for life, and if *B.* die before *A.* remainder to *C.* for life, here the event of *B.*'s dying before *A.* does not in the least affect the determination of the particular estate, nevertheless it must precede and give effect to *C.*'s remainder; but such event is dubious, it may or may not happen, and the remainder depending on it is therefore contingent.—

4 Leon. 237. pl. 363.

So if lands be given to *A.* in tail, and if *B.* come to *Westminster* hall such a day, to *B.* in fee; here *B.*'s coming to *Westminster* hall has no connection with the determination of *A.*'s estate, but as it is an uncertain event, and the remainder to *B.* is not to take place unless it should happen

happen, such remainder is a contingent remainder to *B.*

Thirdly, Where a remainder is limited to take effect upon an event, which, though it certainly must happen some time or another, yet may not happen till after the determination of the particular estate; as if a lease be made to *J. S.* for life, and after the death of *J. D.* to remain to another in fee; now it is certain that *J. D.* must die some time or another, but his death may not happen till after the determination of the particular estate by the death of *J. S.* and therefore such remainder is contingent. — So in case of a lease for life to *A.* and after the death of *A.* and *M.* the remainder to *B.* in fee, this is a contingent remainder; for the particular estate being only for the life of *A.* and the remainder not to commence till after the death of *A.* and *M.*, if *A.* die before *M.* the particular estate will end before the remainder can commence, which is very possible, and therefore such remainder is contingent. — So if a feoffment were to the use of *A.* for 21 years, if he should so long live, and after his death to the use of *B.* in fee, here *A.* might survive the 21 years; if he should, the particular estate would determine before the remainder could commence, and therefore such remainder would be contingent, and would be void for want of a preceding freehold to support it, as will appear hereafter.

Fourthly, Where a remainder is limited to a person not ascertained or not in being at the time when such limitation is made; as if a lease be made to one for life, remainder to the right heirs of *J. S.* now there can be no such person as the right heir of *J. S.* until the death of *J. S.* for *nemo est hæres viventis*, which may not happen

till after the determination of the particular estate, by the death of tenant for life, therefore such remainder is contingent. — So where a remainder is limited to the first son of *B.* who has
 1 Vent. 306. no son then born, here *B.* may never have a son, or if he should the particular estate may determine before the birth of such son, therefore this remainder is contingent. — So an estate to two for life, remainder to the survivor of them in fee,
 Cro. Car. 102. is a contingent estate, for it is uncertain who will be the survivor.

Every species of contingent remainders may, I apprehend, be reduced to one or other of the foregoing descriptions; but although every one of those descriptions is necessary, in order to comprise in our general distribution every known instance of a contingent remainder, yet we must remember, that several cases which fall literally under one or other of the two last descriptions are nevertheless ranked among vested estates.

To begin with those cases which are exceptions to the third of the foregoing descriptions, I must observe, that where there is a limitation for a long term of years, as 80 or upwards, determinable on the life of a person then in being, with remainder over on the death of that person, to a person *in esse*, as a limitation to *A.* for 80 years, if *B.* so long live, remainder after the death of *B.* to *C.* in fee, it has been held, that notwithstanding the remainder is in this case limited to take effect on an event, (*viz.* the death of *B.*) which possibly may not happen till after the expiration of the preceding estate for 80 years, yet as the chance against such event's happening before the expiration of the preceding
 term

term is exceedingly small, such remainder shall be considered as vested, and that the mere possibility that a life in being may endure 80 years to come, does not amount to a degree of uncertainty sufficient to constitute a contingent remainder.

As if a feoffment be to the use of *A.* for 99 Pollexf. 67. years if he shall so long live, and after his death to the use of *B.* in fee; this shall not be contingent, but it shall be presumed his life will not exceed 99 years; but it had been otherwise if it had been made but for 21 years, *per Hale C. J.*

— So in the case of *Napper and Saunders*, re^d Hutt. 119. ported by *Hutton*, which, as to the present point, was this. *A.* made a feoffment to the use of herself for life, remainder to the use of trustees for 80 years, if *B.* should so long live, remainder to *C.* in tail, and it was adjudged that this remainder to *C.* in tail was a vested remainder, and a similar case is there cited by the court, by the name of Lord *Derby's* case, in which such a Vid. Lit. limitation was adjudged a vested remainder, after Rep. 370. many arguments upon the case at *Serjeants Inn*.

— But to give this sort of limitation any effect, a freehold must precede it, unless in some cases of conveyances to uses; in both the cases here cited as determined, there was a preceding freehold limited to the feoffor, which prevented any question arising as to the validity of the limitation after the term of years, on the ground of its being a freehold to commence *in futuro*, viz. after the death of the person on whose life the term was determinable; whereas if there were an immediate limitation to *C.* for a term of years, if *D.* should so long live, remainder after the death of *D.* to *E.* In this case there being no freehold first limited, it would be a limitation

of a freehold to commence *in futuro*, and therefore incapable of taking effect; consequently the case stated by C. J. *Hale*, if taken strictly as he stated it, without any preceding freehold, must depend on some other principle, of which *vide* hereafter in the case of *Penbay v. Hurrel*. I must remark here, that the Lords Commissioners in a case of this nature in *Chancery*, where the preceding estate was only for 60 years determinable on a life, were of opinion the remainder could not be considered as vested; this was a limitation by devise, and no preceding freehold limited. I do not find any decree upon it, but it seems to have been good as an executory devise, though not as a remainder, of which *vide* in the chapter of Executory Devises.

We come next to the cases which are to be excepted from the literal extent of the last of the foregoing descriptions; these will be found to be much more numerous, as they depend on one hand on a general rule of law respecting limitations to the heirs general or special, where the ancestor takes an estate of freehold in the same conveyance, and on the other, upon the respect which is paid to the intent of a testator where it can be collected from any particular expressions in his will.

Upon the first of these grounds we are to observe, that wherever the ancestor takes an estate of freehold, or frank tenement, and an immediate remainder is thereon limited in the same conveyance to his heirs or heirs in tail, such remainder is immediately executed in the ancestor so taking the freehold, and therefore is not contingent or in abeyance: as an estate for life to *A*. remainder to the heirs of his body; this is not a contingent remainder to the heir of the body of *A*. but an estate

2 Vern. 131.
Beverley v.
Beverley.

2 Roll. Abr.
417.
1 Rep. 104.

1 Inst. 22. b.

estate-tail executed in *A.* So likewise wherēven the ancestor by any gift or conveyance takes an estate of freehold, and there is afterwards in the same gift or conveyance a limitation to his right heirs or heirs in tail, after some other estate for life or in tail interposed between his freehold and such limitation to his heirs, this remainder to his heirs vests in the ancestor as a remainder; and shall not be in contingency or abeyance.

As a lease for life with divers remainders over, remainder to the right heirs of first lessee for life, this is a remainder in fee vested in the first lessee for life; and after his death, and the determination of the mean remainders, his heir shall be in as heir, and not as purchaser. So where land is given to *A.* for life, remainder to *B.* for life, remainder to the heirs-male of the body of *A.* who has two sons, the eldest has issue a daughter, and dies, *A.* and *B.* die, the youngest son shall have the land as heir-male; which proves that he took by descent, and not by purchase, and consequently the estate-tail vested in the father; for had the younger son taken by purchase, he must have been complete heir-general as well as heir-male, which two characters could not be united in him during the life of the eldest son's daughter.

Kell indeed takes a distinction by saying, that where the frank tenement is so limited to the ancestor, that all the mediate estates between that and the limitation to his heirs, as well as his own estate, may determine during his life, in that case the limitation to his heirs is a contingent remainder; as if a feoffment be made to the use of *A.* and *B.* during their joint lives, and, after the death of either of them, to the use of *C.* for life, remainder to the heirs of the body of

2 Roll. Abr.

417.

1 Rep. 104.

Brook Done,
Et. pl. 11.Brook Nofme,
pl. 1. 40.

1 Inst. 24. b.

2 Roll. Abr.
418.

of *B.* this remainder, he says, does not attach in *B.* but is in abeyance; because if *A.* and *C.* die in the lifetime of *B.* the estate to *B.* is determined, and the remainder to *C.* ended, and yet the remainder to the heirs of *B.* cannot take effect, because he cannot have an heir during his life. It must be admitted, if the word *heirs* is in this case to be taken as a word of purchase, the remainder must be contingent for the reason given by *Roll*; but the question is, whether that word is to be considered as a word of purchase or not?

Now, with regard to this question, I must observe, that *Roll* cites no authority at all for this distinction, and I find it is opposed by two authorities, which are expressly to the contrary: *Perk. f. 337.* The first is in *Perkins*; if lands be leased unto *A.* and *B.* for the life of *C.* the remainder unto the right heirs of *A.* and *A.* take a wife, and *C.* dieth leaving *A.* and *B.*, and *A.* dieth leaving *B.*, the wife of *A.* shall be endowed; because that *cestui que vie* (*C.*) dieth, living *A.* the husband, so as the freehold and inheritance are joined in the husband during the coverture. Here we see the freehold was limited to *A.* only during the life of *C.*, so that it very probably might, (and as the case is put, did) determine before the death of *A.*, but notwithstanding he could have no heir at the time when his freehold so determined by the death of *C.*, yet the freehold and inheritance it seems became united in him at the death of *C.* consequently the remainder to his right heirs was completely executed in himself by the death of *C.*, and therefore that limitation must have been a vested remainder in its creation; for had it been a contingent estate to the heir of *A.* the inheritance could never

never have been executed or vested in *A.* Con-
 sonant to this is the other case, which is in
Keble: an estate was limited to husband and wife 1 Keb. 889.
 during their joint lives; and after the decease of Merrel and
 either of them, remainder to the heirs of the body Rumsey.
 of the wife begotten by the husband, remainder to Raym 127.
 the wife for life. Upon a dispute between the
 children and the wife, after the death of the
 husband, whether this was an estate-tail in the
 wife or a contingent remainder to the children,
Keeling conceived it an estate tail, executed *sub*
modo, not presently by severance of the joint-
 ture, as it would be by a several conveyance,
 but upon the death of him whose life kept the
 estates asunder, they were united and executed;
 and the court agreed there was no contingency
 either in estate or person, and that an estate to a
 woman *durante viduitate*, remainder to the heirs
 of her body, is an estate-tail in the woman.
 In this case likewise we observe that the free-
 hold which the wife took by the limitation was
 only for the joint lives of herself and husband,
 and consequently must determine in her life-
 time if her husband should die before her, in
 which case she could have no heir of her body
 when it determined: the case actually so hap-
 pened; yet we find it was adjudged an estate-
 tail in the wife. The like observation may be
 made as to an estate to a woman *durante vidui-*
tate, remainder to the heirs of her body: her
 freehold may determine before she may have
 any heir of her body; nevertheless the court
 held such a limitation to be an estate-tail. In
 the case put by *Roll*, there is an intermediate
 remainder to *C.* for life, but the only difference
 to be inserted on that account (if we reason by
 analogy to the cases where the ancestor takes
 the

the freehold for his own life,) is, that the limitation vests in that case as a remainder, instead of being executed in possession, as it was in the latter cases which I have cited.

Upon the whole; on the authority of the last cases, I apprehend, that the possibility of the freehold's determining in the life of the ancestor who takes it, does not keep the subsequent limitation to his heirs from vesting in himself; and therefore, I think, we may venture to lay it down as a general rule, that whensoever the ancestor takes any estate of freehold, whether for his own life or the life of another, or whether it be of such a nature that it may determine in his lifetime or not, and there is afterwards, in the same conveyance, a limitation to his right heirs or heirs in tail, either immediately, without the intervention of any mean estate of freehold, between his freehold and the subsequent limitation to his heirs, or mediately, that is, with the interposition of some such mean estate, there such subsequent limitation to the heirs, or heirs in tail, vests immediately in the ancestor, and does not remain in contingency or abeyance; with this distinction, that where such subsequent limitation is immediate, it then executes in the ancestor, and becomes united to his particular freehold, forming therewith one estate of inheritance in possession; but where such limitation is mediate, it is then a remainder vested in the ancestor who takes the freehold, not to be executed in possession till the determination of the preceding mean estates.—As if there be an estate to *A.* for his life, or during the life of *C.* or any other sole estate of freehold, remainder to the heirs of the body of *A.*, this is an estate-tail executed in *A.*; but if there be an estate to *A.* for

for his life, or during the life of *G.* or any other freehold, remainder to *B.* for life, remainder to the heirs of the body of *A.*; this is only a present freehold in *A.* with a vested remainder to him in tail, to take effect in possession after the determination of *B.*'s estate. If the particular estate were to *A.* and *B.* jointly for their lives, remainder to the heirs of the body of *B.* this would be an estate-tail in *B.* executed *sub modo*, that is, so as not to sever the jointure, nor intitle the wife of *B.* to dower. 1 Inst. 184. 2. Perk. f. 334. 337.

So if there be a limitation to *baron* and *feme* for their lives, and the life of the survivor of them, remainder to the heirs of their bodies, it is an estate-tail executed in them. And in case of a limitation to *baron* and *feme* for their lives, remainder to the first and other sons of the marriage successively in tail, remainder to the heirs-male of the bodies of the *baron* and *feme*, it is an intail executed in the *baron* and *feme*, *sub modo*, that is, so as not to merge the estates for life absolutely, but only till the birth of the first son, and then the estates will become divided by operation of law, and the *baron* and *feme* will be tenants for their lives, with remainder to their first and other sons. But where the limitation was to *baron* for life, remainder to wife for life remainder to the heirs of their bodies, it seems the estate-tail was not executed in them in possession, but only vested in them as a remainder; because the limitation to their heirs being a joint limitation to them, did not correspond with their estates for life, which were distinct and successive, and consequently they had several estates for life with a joint remainder in tail. 11 Rep. 80. Lewis Bowles's case. 1 Lev. 36. Raym. 36. Stephens v. Bretridge.

There is a case of this nature reported in *Atkyns*, where, upon a surrender of a copyhold 2 Atkyns 101. Sutton v. Stone.

to the husband for life, then to the wife for life, and to the heirs of the bodies of the husband and wife, remainder in fee to the survivor, it is said, the limitation did not vest an absolute estate-tail in the wife who survived, but only gave her an estate-tail *after possibility of issue extinct*, and the estate-tail vested in the person who was heir of the body both of husband and of wife; as there are no arguments or reasons for the resolution of the court there mentioned, it being rather a *memorandum* than a *report* of the case, it is no easy matter to account for the decree in all its points. The limitation to the heirs of the bodies of the *baron* and *feme*, must either have been executed in them, as an estate-tail in possession, or have vested in them as a remainder, or have been a contingent limitation to the heir of both their bodies; in the first case, the estate-tail in possession would have survived to the wife on her husband's death; in the second, the joint remainder in tail surviving to her, would have merged her estate for life, and she would thereby have become tenant in tail in possession; and in neither of these two cases, could she be tenant in tail *after possibility of issue extinct*, so long as any issue of her body by her deceased husband was living; for neither husband nor wife tenants in special tail, are tenants in tail *after possibility of issue extinct*, till the death of the other of them, and failure of issue of their two bodies, *vid. 1. Inst. 27. b.* and if there were any such issue then living, it could not vest in such issue till her death. In the third case, she could take no estate-tail at all, and consequently, could not be tenant in tail *after possibility of issue extinct*; therefore the only cases in which she could be tenant in tail after

after possibility of issue extinct, were those two, in which it was impossible there should be any such person at all, as the heir of both their bodies. Its being a surrender of a copyhold, made no difference in the construction, as it was agreed in the same case, that surrenders of copyholds should be construed as other conveyances at common law. The resolution in this case, upon common law principles, I apprehend, must have been thus: the husband and wife taking distinct and successive estates for life, the joint limitation to the heirs of their bodies vested in them jointly, as a remainder in tail, this remainder survived to the wife upon the decease of her husband, and merging her estate for life, made her tenant in tail in possession; but having had no issue by her deceased husband, or such issue being extinct at the time of this resolution, she thereby became only tenant in tail after possibility of issue extinct.

But a limitation to *baron* and *feme*, and the *Vid. Cro. Car.* heirs of the body of the *baron*, is an estate tail ^{321 King. v. Edwards.} executed in the *baron*, for here is no contingency to suspend the vesting of the estate; for whether the *baron* or *feme* die first, the *baron* may equally have an heir of his body, upon the determination of the first limitation.

If there be a limitation to the *feme* for life, remainder to the heirs of the body of *baron* and *feme*, this is no vested remainder in the *feme*, for the freehold is limited to her alone; and as the person who is to take in remainder, must be heir of both their bodies, if the *feme* should die before the *baron*, there can be no one to answer that description when the particular estate determines, because the *baron* cannot have an heir during his life; therefore the remainder is in contingency. ^{1 Roll. abr. p. 417. H. pl. 1. & 2.}

tingency. We are to distinguish the reason of this last case, from that above noticed, where the limitation to *the heirs, &c.* is held to vest, notwithstanding the ancestor's freehold may determine in his lifetime; the limitation there is to the heirs, &c. of the ancestor only, but here it is to the heirs, &c. of the ancestor and of her *baron*; and tho' every person may so far be supposed to carry his own heirs, &c. in himself during his life, as that a limitation to them where he takes a preceding freehold, may vest in himself; yet no person can be supposed to carry in himself, the heirs &c. of himself and of somebody else.

It is immaterial whether the ancestor takes the freehold by express limitation or by implication; in either case the subsequent remainder to his heirs vests in himself; as in the case of *Py-
1 Vent. 372. bus and Miford*, where *A.* seised in fee, covenanted to stand seised to the use of *his heirs-male begotten, or to be begotten, on the body of his second wife*; here, upon the principle laid down by my Lord Coke, *1 Inst. 23. a. that so much of the use as the owner of the land does not dispose of, remains in him*, *A.* was held to take an estate for his own life by implication; for the limitation being to the heirs of his body, &c. and it being impossible for him to have any such heir during his life, the use during his life was undisposed of. And an estate by operation of law being considered as equivalent to an estate by deed; it was held, that the subsequent limitation to his heirs-male, &c. was executed on the estate for life which he had by implication, and created an estate tail in *A.*

But where the legal estate is limited away during the life of the covenantor or feoffor, the
1
freehold

freehold cannot result by implication, and consequently the subsequent limitation to his heirs; &c. will be a contingent estate. As where *A.* made a settlement to the use of himself and his heirs, until his intended marriage, and afterwards to the use of his wife for life, and after her decease, to the *use of trustees* and their heirs, during his own life, upon trust, to permit and suffer *A.* to take the profits, remainder to the first and other sons of the marriage, remainder to the heirs of the body of *A.* it was adjudged that the limitation to the heirs of the body of *A.* operated as words of purchase, and of course created a contingent remainder, because *A.* took only a trust-estate for life, the *use* being limited to the trustees, and the legal estate for his life, executed in them by the statute of uses.

Carth. 272.
Tippin v.
Colin.

So where *A.* having two sons, *C.* and *D.* covenanted to stand seised to the use of *C.* and the heirs-male of his body on *M.* his wife to be begotten, and for want of such issue to the heirs-male of the covenantor, and for want of such issue to his own right heirs for ever; *C.* the eldest son died, leaving issue one son and several daughters, *A.* died, and then the son of *C.* died without issue; the question was, how *D.* could be let into the estate, under the limitation to the heirs-male of his father *A.*? for by way of purchase, he could not be intitled, not being complete heir whilst his nieces were living; it was therefore contended, that *A.* took an estate for life by implication, and consequently, that the limitation to his heirs-male vested in himself as an estate-tail, and so descended to *D.* as special heir. But the court held that limitation to be words of purchase, and to vest in the son of *C.* upon the death of *A.* as heir-male of his body by purchase, and that on the death of *C.*

2 Mod. 207,
211. South-
cot v. Stowel.

son it descended to his uncle *D.* as heir-male of the body of *A.* *per formam doni*; they allowed no estate for life in *A.* by implication, and seemed to doubt the doctrine, in the case of *Pybus and Mitford*. But we may observe, this judgment did not in the least affect or clash with the judgment, in the case of *Pybus and Mitford*, for there the covenantor had not limited any use at all, during his own life; the limitation to his heirs-male was a future limitation; whereas in this case the covenantor had limited a present use to his son *C.* in tail, and therefore the freehold being so actually limited away, could by no implication be supposed to remain in the covenantor. In this manner, the two cases of *Pybus v. Mitford*, and *Southcot v. Stowell*, are easily reconciled; and so far are they from being contrary authorities to each other, which for want of attention, they are sometimes taken to be, that it appears they are both express authorities for, and equally confirm the distinction before taken, *viz.* that where the use of the freehold is not limited away, it results to the covenantor or feoffor, by operation of law; but that where it is limited away, the covenantor or feoffor, shall take no estate for life by implication.

In the cases where the first use was limited away for a term of years, it was a matter of great doubt, whether the freehold resulted to the feoffor or covenantor or not; and indeed, in the case of *Penbay v. Hurrell*, where *A.* seised in fee by deed and fine conveyed to the use of trustees, for 70 years if *A.* should so long live, and from and after the death of *A.* then to the use of *B.* in which case it was objected, that the limitation to *B.* must be void, as being a freehold to commence *in futuro*, *viz.* not till after

2 Freem. 231.

235. 252.

2. Vern. 370.

after the death of *A.* there being no freehold limited to take effect until that event: Lord Keeper, after much consideration, and a case stated to the judges, gave his opinion, that *A.* had an estate for life by implication, and so all the limitations over were good, there being a freehold to support them. It is obvious, that if this doctrine were established throughout, there could scarcely be such a thing as a contingent remainder's failing for want of a sufficient preceding estate; for in all limitations of uses, if no sufficient particular estate were expressly limited, such a one would nevertheless exist by way of resulting use. It was indeed agreed, that if the limitation had been by way of *covenant to stand seised*, the covenantor would have had the freehold by implication, because he had never departed with it; but the question was, whether in the case where the conveyance to uses enured by way of transmutation of possession, as by *fine* or *feoffment*, &c. the use should result, and be implied out of the seisin of the feoffees or conusees; but upon the strength of Lord Coke's opinion in the case of *Fenwick v. Mitford*, and the concurrent authority of Lord Chief Justice *Hale's* opinion, in the case of *Pybus v. Mitford* before cited, that as well in a fine or feoffment, as in a covenant to stand seised to uses, so much of the use as a man does not limit away remains in him, the above case was solemnly determined, in the manner I have mentioned.

This last case we are to observe is essentially different from the cases of *Nappers* and *Saunders*, and of Lord *Derby*, cited in a preceding page. In those cases, a freehold was first limited; no question could therefore arise concerning the limitation of a freehold *in futuro*; the only

doubt there, was as to the vesting of the subsequent limitation after a life, which it was possible might outlive the preceding term; but here the question respected the validity of the limitation, as being a freehold to commence *in futuro*, unless some preceding freehold were implied. The principle on which the remainder in this case was decreed a good one, is the only foundation upon which the case put by *Hale C. J.* before mentioned (where I cited the case of *Napper and Saunders*) can be supported; he has there stated a case, without the limitation of any preceding freehold; now it is clear, that if no freehold were implied in the feoffor, the freehold to commence after the death of the person, on whose life the term was determinable, would be a freehold to commence *in futuro*, and therefore void in that case, as it would have been in this case, without such implication.

2 Salk. 679.

Adams v. Savage. & vid.

1 P. W. 388.

Else v. Osborn

ib. 359 Sir

Thomas Tip-

pen's case.

In a case in the *King's Bench*, subsequent to the case of *Penkay v. Hurrel*, where *A.* by lease and release conveyed to trustees and their heirs, to the use of *A.* for 99 years, remainder to the use of trustees for 25 years, remainder to the heirs-male of the body of *A.* it was determined, that *A.* although he had not limited the use of the freehold away, should not take an estate for life by implication; consequently, the remainder to the heirs-male of his body did not vest in himself, but was a contingent limitation, and void for want of a preceding freehold, as will appear hereafter. Now there is this distinction observable between these two cases; in the former, though a present use was limited away, yet no use at all was limited to the grantor, and therefore nothing appeared to rebut the implication, that he should take the use of the present

sent freehold, which was not limited away; where-
 as in the latter case, the use was expressly limited
 to the grantor for years; now if he had taken
 the freehold by implication, this use for years
 would have been merged in it, which would be
 raising an estate by implication, to destroy an
 estate expressly limited in the deed; directly con-
 trary to the nature of implication, which can
 only take effect either as the import of what is
 expressed, or as an inference from something's
 being not expressed

So, no use will
 result, where
 the estate is
 not the gran-
 tor's, but his
 wife's. Salk
 675. Davis v.
 Speed.

But where the ancestor is himself the grantor, there a limitation to his own right heirs will continue in himself as the reversion in fee, and is not a remainder, although the freehold is expressly limited from him: as where a fine was levied to the use of the wife of conusor for life, remainder to the use of *B.* in tail, remainder to the use of the right heirs of conusor, this was adjudged a reversion in the conusor.

Moor 284.
 Fenwick v.
 Mitford.
 Vide also 2
 Rep. 91. b.
 Moor 721.
 Earl of Bed-
 ford's case.
 Cro. Eliz.
 334.

Here, however, we are to observe, that if there be tenant for life, and afterwards, the reversion by some other conveyance be limited to his heirs, &c. such limitation will not be executed in him. So if there be a limitation to a man's heirs in any deed, and afterwards he, by other means, becomes seised of the freehold, in this case the two estates will not become united in him, but the limitation to his heirs will still continue what it originally was, a contingent remainder; as where *A.* was tenant for life of *B.* remainder to the right heirs of *B.*, *A.* afterwards granted his estate to *B.* so that he became tenant for his own life, remainder to his right heirs; yet this remainder continued a contingent remainder.

Skin. 559.
 2 Leon 7.
 Ld. Raym.
 37.

The general rule above laid down, respecting a subsequent limitation to the heirs after an estate of freehold given to the ancestor in the same conveyance, holds in the case of a will as well as of a conveyance at common law, wherever the limitation in question gives a legal and not a trust-estate. This I shall endeavour to prove in the next following pages.

The rule is supposed to have been originally introduced to prevent frauds upon the tenure; if such a limitation had been construed a contingent remainder, the ancestor might have destroyed it for his own benefit, if occasion had called for it; if not, he might have let it remain to his heir in as beneficial a manner as if it had descended to him, at the same time that the lord would have been deprived of those fruits of his tenure which would have accrued to him upon a descent. So that under such a construction, the ancestor would have had all the power over the estate which he would have had over a vested inheritance; and if he were not inclined to use that power, his heir would have taken the estate as fully as by descent, without the feudal burdens to which he would have been liable, in consequence of a descent. So advantageous a construction would doubtless have made limitations of that nature very frequent, to the great prejudice of the Lord of whom the lands were holden. In those cases, indeed, where the limitation to the heirs, &c. was not immediate upon the limitation of the freehold to the ancestor, or where the ancestor himself would not be intitled to the inheritance upon the destruction of the remainder to his heirs, &c. there it could not be to the ancestors interest, to destroy the remainder to his heirs, though

though it had been construed contingent, but nevertheless, the heirs would have escaped the same duties to the lord, and the lord of course have been the same loser in these as in the other cases. Therefore, though there could be no ground to apprehend the great frequency of limitations of the latter sort, because of the limited interest the ancestor could have in them; yet, as they would have proved equally prejudicial to the lord whenever they should occur, as those other wherein the ancestor had a greater interest, the same reasons prevailed to extend the rule to all of them.

Upon these grounds, it seems, that the general rule I have been treating of is found to extend to all the several cases I have enumerated. The mischief to be obviated was the same, whether the limitation was created by deed or devise; it naturally follows, that the same rule should take place in both cases. The reason upon which this rule of law first took its rise, ceased, it is true, with those fruits of tenure which it was calculated to preserve; so has the reason upon which the right of *primogeniture* was first established in this kingdom, long since ceased; nay, the original reason of most of our laws of property (to say nothing of our other laws) existed no longer than the old feudal tenures prevailed; yet, I presume, the right of *primogeniture* is still considered as part of the laws of descent of lands in this kingdom. Nor can any authority prevail upon me to believe that the act of *Charles II.* virtually annihilated almost the whole body of our *English* laws, only by converting other tenures into common socage tenures. We have many laws, the origin of which cannot at this distant period be

traced at all; yet, justly should we laugh at the man who should urge that as an argument against the present validity of such laws: and surely a law for which no reason at all now appears, has no more original ground in the present state of things, than a law, whose origin may be traced up to a circumstance which does not now exist; what reason then can be assigned why the one should be less sacred than the other?

It is true, where those things which are the objects of a law cease to exist, there the law itself must of necessity cease for want of subject-matter to relate to or have any effect upon; but it by no means follows, that where the same objects of a law still continue, that there the law should cease, only because the very state of things which was the first occasion of that law no longer exists.

The necessity for laws of some sort or other must be admitted, and it is evident that some accident, circumstance, or state of things, must be the first motive to every law: now although, after the establishment of a law, that very accident circumstance or state of things which first introduced such law may happen to cease, yet, whilst the same subject of that law continues there must be still the same necessity for some law or other with respect to that subject; but if the old law is to cease with the circumstance or state of things which gave it birth, it follows, that the subject of such expired law must remain at large unregulated by any law, and subject only to the arbitrary direction of ignorance, partiality, or caprice, until legislature shall interfere and make a new law; this would be opening a door perpetually to all that
uncertainty,

uncertainty, confusion, and inconvenience, which laws were intended to obviate and prevent. — I therefore conceive myself justified in concluding, that every law once established continues to be a law whilst the subject of it exists, until altered by some solemn act of legislation.

Now, with respect to the rule of law, whereby the limitation to the heirs, &c. is executed in the ancestor, though we admit the reason upon which it first took place no longer to exist, yet the subject of the law still remains, there are still the same limitations of estates for the rule to operate upon, and the law having been once so established (no matter upon what ground) the courts of law, who considered themselves as entrusted with the power, not of abrogating or altering, but only of expounding and pronouncing *established* laws, have, through a long succession of determinations on this point, grounded their judgments entirely upon that rule, as will appear, when I come to consider the several cases respecting it.

The court of *Chancery* indeed does not consider itself tied up to an implicit observance of the same rule, in respect to those limitations, which are the immediate objects of that court's jurisdiction, I mean limitations, which do not immediately vest the legal estate. In the decreeing the execution of marriage-articles, and in the construction of trust-estates, that court regards the end and consideration of the settlement and the intent of the trusts, rather than the legal operation of the words in which the articles or the trusts are expressed.

Thus, in the case of articles before marriage for making a settlement, if there be a limitation to one of the parties for life, with a remainder
to

1 Eq. Abr.
387.
Trevor v.
Trevor.

to the heirs of the body of the same party, the latter words are considered as words of purchase, and not of limitation, and the future settlement or conveyance in pursuance of such articles, will be decreed to be made agreeable to such construction. As where *A.* in consideration of an intended marriage, entered into articles, by which he covenanted to settle an estate to the use of himself for life, without impeachment of waste, remainder to his intended wife for life, remainder to the use of the heirs-male of his own body; and afterwards having reason to be dissatisfied with the weakness and disobedience of his eldest son, he, before any settlement made, levied a fine (supposing himself to be tenant in tail by the articles) in favour of his second son. Upon the death of *A.* a very considerable personal and real estate descended to his eldest son; nevertheless it was decreed, that a conveyance in tail of the settled estate should be made to the eldest son, for that the father was not tenant in tail under the articles, but only for life, and therefore could not bar his son.

1 Eq. Abr.
392.
Jones v.
Laughton.

So where articles were entered into, whereby it was agreed that the wife's portion should be laid out in the purchasing of lands, which should be settled on the husband and wife for their lives, and the life of the survivor, and after to the heirs of the body of the wife by the husband to be begotten; yet the settlement was decreed to be made to the first and other sons successively in tail, so that the husband and wife might not have power to bar the issue. The general reasons upon which such decrees were founded, are these: articles are only heads of agreement between the parties,

ties, and the issue of the marriage are objects of consideration in the settlement; consequently we must suppose an intention to provide for them; which intention would be frustrated, if it were to be in the power of the parties immediately to bar them.

But here we must remark, that although in the case of articles before marriage to settle an estate for life on either of the parties, remainder to the heirs of the body of the same party, if a settlement were made after marriage with the same terms of limitation, *Chancery* would rectify it, and make it a strict settlement, for the reasons I have mentioned; yet that court would not interfere, if both articles and settlement were made before marriage, unless the settlement in that case were expressed to be made in pursuance of the articles; for the court would suppose that the parties had altered their intention with respect to the terms of the marriage, which they may do before the marriage, though not afterwards; and that the settlement was made in pursuance of such new agreement, and not of the articles; but when it is said to be made in pursuance of the articles, no room at all is left for such a supposition. But, however, no such alteration or rectification of a settlement, as I have been speaking of, shall take place against a purchaser, as appears in the case of *Warrick v. Warrick*, in which case Lord *Hardwicke* held, that though the court gives relief in such cases against persons claiming under the settlement and their representatives, yet no case had gone so far as to relieve against purchasers; and that unless there are articles, as well as a settlement, the court will never de-

Cal. Temp.
Talb. 20.
2 P. W. 349.
West v. Eri-
sey.

2 Atk. 291.

cree

tree words which give a legal estate-tail, to be carried into strict settlement.

Solikewise in decreeing the execution of a truⁿ, the court of *Chancery* will so far depart from that which would be the legal operation of the words limiting the trust, if reduced to a common law conveyance, as to construe the words *heirs of the body of cestui que trust*, although preceded by a limitation for life, as words of purchase and not of limitation, whenever it appears by some clause or other, which is repugnant to the nature of an estate-tail, that the maker of the deed or will intended only an estate for life :

2 P. W. 471.
Papillon v.
Voice, and vid.
Cas. Temp.
Talb. 3.
Lord Glen-
orchy v. Bos-
ville.

as where *A.* devised a sum of money to trustees in trust, to be laid out in lands, and to be settled on *B.* for life, without impeachment of waste, remainder to trustees and their heirs during the life of *B.* to support contingent remainders, remainder to the heirs of the body of *B.* remainders over, with a power to *B.* to make a jointure. It was decreed that *B.* should take but an estate for life ; and Lord Chancellor *King* took a distinction between a legal estate and an estate executory ; and held, that where the party must come into the court of *Chancery*, in order to have the benefit of the limitation, the intention should take place, and not the strict rules of law. So in the case of *Bagshaw* and *Spencer*,

1 Vezey 142.
2 Atk. 246.
577.

where *A.* devised lands to *B.* and *C.* and their heirs in trust, by rents and profits, sale or mortgage, to pay his debts, &c. and after in trust, as to a moiety to the use of *T.* for life, without impeachment of waste, remainder to trustees and their heirs during the life of *T.* to support contingent remainders, remainder to the use of *the heirs of the body of T.* remainder over. Lord *Hardwicke* decreed, that *T.* took but an estate for

for life, for that the whole fee being devised to the trustees, it being expressly to them and their heirs, and they having power to dispose of the inheritance, no legal estate could be limited upon it, and therefore T. could not take a *legal*, but a *trust-estate*; and being only a trust-estate, the intent manifested by the clause appointing trustees to support contingent remainders, should controul the legal operation of the words; he grounded his decree on the difference between a mere legal estate and a trust in equity.

From the example of the court of *Chancery* in such instances as the above, some people, with more plausibility than reason, have endeavoured to draw an argument that the courts of law should indulge the same latitude of construction, assuming it as a principle, that there is no sound distinction between the devise of a legal estate and a trust: but this is *petitio principii*; for I believe there is not a point in our books more clearly and accurately agreed than the distinction between a legal devise and a trust; which appears as well from the cases I have already mentioned, as from those which I shall mention by and by. In the mean time, as to the soundness and reason of the distinction, we are to consider, that trusts were the mere creatures of confidence between party and party, and totally distinct in almost every quality, from those legal estates which were the subjects of tenure. They were in their nature independent of tenure, and therefore not the objects of those laws which were founded in the nature of tenure. They were rights arising solely out of the intent of the party who created them, and therefore such intent could be the only guide in the execution of them. Consequently, when a court of equity,

equity, in certain cases of trust-estates, deviates from the rule above laid down, it does not in so doing depart at all from any rule of law by which it was ever bounden: it only exercises that conscience and discretion to which trust-estates were in their nature originally and necessarily subject. And yet even the court of *Chancery*, in order to preserve as near a correspondence as may be between the rules of construction, with regard to trust-estates, and those laws by which legal estates are construed, considers itself as bounden, even in the case of trust-estates, to decree according to the rule I have been speaking of, wherever it can be done without manifest violation to the intention of the parties. As when one devised lands for payment of his debts, and afterwards as to part to *A.* for life, with power to make leases, remainder to the heirs-male of the body of *A.* though this was but the devise of a trust and executory, yet it was held to be an estate-tail in *A.*; for Lord Chancellor said, that it could not be inferred with any certainty from the power of leasing given by the testator, that no estate-tail was intended. So where there was a devise in trust for *A.* for life, afterwards to *B.* for life, afterwards to the heirs of *B.*'s body, Lord *Hardwicke* decreed a conveyance in tail to *B.* upon this principle, that a court of equity in cases of trust-estates was not to over-rule the legal construction of the limitation, unless the intent of the testator or author of the trust should appear by declaration plain.

1 P. W. 142.
Bale v. Coleman.

Garth v. Baldwin.
2 Vezey, 646.

But to support the argument, that courts of law should give into the same latitude and freedom of construction as the court of *Chancery*, in respect to the limitation I am treating of, it has been

been urged, as a strange kind of inconsistency, that the same limitation should bear different constructions on the different sides of *Westminster* hall; that a man should be tenant in tail on one side of the hall, by the very same limitation, which, if he steps across to the other side, will make him only tenant for life: the objection sounds specious enough, but if we look to any thing further than mere words, it loses its whole force. It is not true that the construction varies with the court; it is the different subject-matter of the limitation which occasions the alteration in the construction of it, and will occasion the same difference of construction even in the very same court. The courts of law and the court of *Chancery* have hitherto agreed in their construction of the limitation in question, whenever it respected a legal estate: the court of *Chancery* distinguishes between a legal estate and a trust, and varies its construction accordingly; if the courts of law had been concerned with trusts, it is to be supposed they would have made the same distinction. Where is the inconsistency in allowing different operations to the same limitation, when applied to objects of such different natures and descriptions as a trust and legal estate clearly are? It is to be admitted, that the general rules of property respecting legal and trust-estates are the same, but the particular modes of construing the limitations of them may vary. The conformity between the rules of property in legal and trust-estates, respects the allowed measure of the limitations, and not the mere construction of them, as Lord *Hardwicke* observed in the case of *Bagshaw* and *Spencer* before cited. The limitations of trust-estates cannot be carried to a
greater

greater length, or go further towards a perpetuity, than the limitations of legal estates; but it does not follow that the first may not be expounded more freely, with more regard to the evident intent, and with less adherence to the legal import of technical expressions, than the latter. Nay, a distinction of that sort naturally arises from the different natures of a trust and legal estate before explained.

2 P. W. 471.
Papillon v.
Voise.

When a court of law, in certain instances, construes the limitation of a legal estate differently from what the court of *Chancery* would construe the same limitation, if applied to a trust-estate, it does exactly what the court of *Chancery* would do in the very same case; as where *A.* devised a sum of money to trustees in trust, to be laid out in lands, and to be settled on *B.* for life, without impeachment of waste, remainder to trustees and their heirs during the life of *B.* to support contingent remainders, remainder to the heirs of the body of *B.* remainder over, with power to *B.* to make a jointure; and by the same will devised lands to *B.* for his life without waste, remainder to trustees and their heirs during the life of *B.* to support contingent remainders, remainder to the heirs of the body of *B.* remainder over. Lord Chancellor *King* took the distinction between a legal and trust-estate, and declared, that as to that part of the case where lands were devised to *B.* for life, &c. the remainder to the heirs of his body were words of limitation, notwithstanding the clause without impeachment of waste, and the limitation to trustees to support contingent remainders, and that *B.* was therefore intitled to an estate-tail; but that as to the other part of the case, which was merely a *trust*, the court had power to construe

strue it according to the manifest intent, and therefore *B.* should there be but tenant for life &c. The same distinction will appear to have been taken in the same court, in other cases which I shall cite hereafter.

Hence, it is easy to perceive, that the force of the argument drawn from the inconsistency of admitting different determinations upon the same limitation in different courts, really makes against that latitude of construction in the courts of law which it is intended to support; for if the courts of law should construe the limitation of a legal estate, in the same manner as a court of *Chancery* does the limitation of a *trust-estate*, the construction of a court of law, and the court of *Chancery*, would often differ with respect to the same limitation of a *legal estate*; because the court of *Chancery* often construes the limitation of a *trust-estate*, differently from the same limitation of a *legal estate*; then indeed would the inconsistency now talked of really exist, as the same limitation of the very same kind of estate, would bear different constructions in different courts; unless the court of *Chancery* should be so far actuated by a spirit of complaisance, as to deviate from its own established rules and distinctions; and implicitly conform to the occasional innovating disposition of another court.

But surely no one will say, that because the court of *Chancery* is not bounden by a rule, which in its nature and design had no relation to the objects of that court's jurisdiction, that therefore a court of law shall cease to be bounden by it in their decisions on cases of a very different kind, and which were the original, and have ever since continued; the

immediate objects of that rule. The same authority that can convert a court of law into a court of equity in one instance, and abolish all distinction between legal estates and trusts, may (without the *obsolete* aid of an act of parliament,) complete the plan of improvement on our ancient laws, and tell us, there is no sound distinction at all between the supposed objects of the jurisdiction of the one court and those of the other: for a court of law and court of equity in this kingdom differ but in name.

Some instances there are, even in cases at common law, wherein the subsequent limitation to the heirs of the body have been so qualified and corrected by other additional words, as to amount to words of purchase, and not of limitation; but I believe no one case can be found, before the late case of *Perrin and Blake* in the *K. B.* 1769; where a perfect unqualified limitation to the heirs, or heirs of the body (in the plural number), preceded by a limitation of the legal estate for life to the ancestor, in the same deed or will, has been determined not to vest in that ancestor, but in the heir by purchase. Many cases it is true are cited to prove such a determination to have been no uncommon thing. But, with submission, I apprehend it no difficult matter to shew, that no one of the cases so cited comes up to the position it is intended to support. It will be found on examination, that some of them are cases of trust-estates, therefore only prove what is not denied; in others, the word *heirs* is not made use of, but the limitation is by words which have not the same established legal import and extent, such as the word *issue* or *sons*, or other words of that sort; in others again, there is no limitation

limitation of the legal freehold to the ancestor; and there is not one of them in which the words *heirs, or heirs of the body* are used, wherein those words are not restrained or qualified, either by reference or else by additional words. Thus, where *A.* conveyed by fine to the use of himself for life, remainder to the use of his first son and of the heirs-male of his body, with like limitations respectively, to his second, third, fourth, fifth, and sixth sons, *remainder to the right heir of A. to be begotten after the sixth son and his heirs-male*; it was held the remainder was contingent, because first limited distinctly to particular sons. So where *A.* covenanted to stand seised to the use of himself for life, remainder to *E.* his son for life, remainder to the first son of *E.* in tail-male, with like remainders to his second, third, and fourth sons, *and so to all and every other the heirs-male of the body of E. respectively and successively, and to the heirs-male of their bodies, according to their seniority of birth, &c.* it was held that *A.* took only an estate for life. Now it is evident that in both these cases of *Walker v. Snow*, and *Lisle v. Gray*, the general import of the words *heir or heirs, &c.* was qualified, by reference to the preceding distinct and particular limitations to the first and certain other sons in tail, and also by words of limitation grafted on them. So where a devise was to *B.* and his heirs lawfully to be begotten, *that is to say*, to his first, second, third, and every son and sons successively, lawfully to be begotten of the body of the said *B.* and the heirs of the body of such first, second, third, and every other son and sons successively, lawfully issuing as they should be in seniority of age and priority of birth, the eldest always, and the heirs of his

Palm. 359.
Walker v.
Snow.

2 Lev. 223.
Raym. 278.
Lisle v. Gray,

Law v. Dav.
vis.

2 Ld. Raym.
1561.

body, to be preferred before the youngest and the heirs of his body, remainder over, &c. It was adjudged that *B.* took but an estate for life; for that the subsequent clause was not contrary to the preceding general limitation to the heirs of his body, but explanatory of what heirs of the body of *B.* were meant: neither of these cases therefore bears any sort of analogy to the case of *Perrin v. Blake*, for there the general limitation to the heirs stood entirely uncorrected and unexplained. The cases of *Leopard v. Earl of Sussex*, and of *Algood v. Withers* in *Chancery*, in 1735, and of *Bagshaw v. Spencer*, were cases of trust-estates, and therefore (even in the court of *Chancery*) no authorities at all in respect to the construction of legal estates. The case cited by Lord *Hale* was a limitation to one for life *et non aliter*, and after his death to the sons of his body. The case of *Backhouse v. Wells*, was a limitation to one for life only, and after his decease to the issue-male of his body, and to the heirs-male of the bodies of such issue. Now, here were words of limitation grafted on the word *issue*, and the word *issue* itself is often a word of purchase, where the word *heirs*, (or even *heir* in the singular number) is not; for which *vide Strange* 731. *Cro. Eliz.* 40. *1 Vent.* 230. In neither of the two last cases is the word *heirs* used. And in the case of *Backhouse* and *Wells* it is observed, that Lord Chancellor *Parker* said, had the words heirs-male been used instead of issue-male, the operation of the law would have been too strong for the intention of the testator. In the case of *Cbeck v. Day*, or *Clark v. Day*, *A.* devised lands to her daughter for life, and if she should marry after the death of the testatrix, and have any heirs lawfully begotten,

2 Vern. 526.

2 Atk. 246,
570, 577.

1 Ventr. 231.

1 Eq. Abr.
284. pl. 27.

2 Strange,
731.

2 Ld. Raym.
1440.

begotten, then she willed that her daughter's *heir* Moor, 593.
 should have the lands after her daughter's death, (cited Lord
 and the *heirs* of *such heirs* : here we observe the Raym. 203,
 limitation was to the *heir* (*lawfully begotten*) in and Gib. 24.)
 the singular number, and words of limitation
 grafted thereon; and indeed as *Fitz-Gibbons*
 states the case as taken from the roll, there is *See post 44.*
a limitation in fee grafted on the word heir,
which carries this case still further from the
point; for the limitation being to the heir (of
the body, or lawfully begotten), could not give
a fee to the ancestor, and an estate-tail in the
ancestor could not have answered the super-
added words of limitation in fee to the heir.
Vide 1 Lord Raym. 206. In *Archer's* case, 1
Rep. 66, the limitation was to *A.* for life, and
 after to the *next heir-male* of *A.* and to the *heirs-*
male of the body of such next heir-male : here
 the word *heir* was in the singular number, pre-
 ceded and distinguished by the word *next*, and
 followed by words of limitation grafted on it.
 In the case of *Luddington and Kime*, *A.* de- 1 Salk. 224.
 vised land to *B.* for life, without impeachment Lord Raym.
 of waste, and in case he should have *issue-male*, 203.
 then to such *issue-male* and his heirs for ever;
 here were words of *limitation in fee* grafted on
 the word *issue-male*, instead of a limitation to
 the heirs. The case of *Doe and Laming* was a *B*
 devise of gavelkind lands, to *A.* and the heirs
 of her body lawfully begotten or to be begot-
 ten, as well *females as males*, and to their *heirs*
and assigns for ever, to be divided equally, share
 and share alike, as tenants in common, and
 not as jointenants, here the words *females as*
well as males, annexed to the words *heirs of the* 2 Burr. 1100;
body, were incompatible with and expressly
 broke the descent; for gavelkind lands cannot

descend in that manner ; and besides there were words of limitation in fee grafted on the words *heirs of the body*, which could not have been satisfied by an estate-tail in the ancestor. Other cases are commonly cited wherein no estate at all, or at most a trust-estate, or term for years only, is limited to the ancestor, as the cases of *Newcomen* and *Barkham*, 2 *Vern.* 729, and *Beaumont v. Long*, 1 *Eq. Abr.* 214, and some others where the ancestor had no estate at all, and therefore the question was of a very different nature ; and the cases of *Peacock v. Spooner*, 2 *Vern.* 43. 195, and *Hodgson v. Buffey*, 2 *Atk.* 89, with others of the like nature, which only respected the trusts of a term, and had nothing to do with the case of an inheritance ; and the case of *Burchett v. Durdant*, 2 *Ventr.* 311, where the legal freehold was in trustees, and not in the ancestor, and *vide Salk.* 667. Of these I shall take no further notice : for the question is not, Whether the words *heirs of the body* may not, under certain circumstances, be taken as words of purchase ; but, Whether those words, standing perfect and unexplained, and preceded by a limitation of the legal freehold to the ancestor in the same will, have ever been construed words of purchase ? After the observations I have been making, I conceive no one of the cases which I have considered can fairly be urged as an authority that they have ; and as to all those wherein the legal freehold is not limited to the ancestor, they are entirely out of the present question. Thus stood the old law as to this point before and until the year 1769, when the case of *Perrin and Blake* came before the court of *King's Bench*. This was a case in point, which fully supplied all the insufficiencies

cies of all the preceding cases, and for some time existed a new and authoritative answer to all former decisions upon the same point. The case was this, a testator devised in the following words: It is my will and pleasure that my sons do not convey *a greater interest than for term of their natural lives*, and to that intent I give, devise, and bequeath my land to my son *J. W.* and if my wife should be brought to bed of a son, to my said son *J. W.* and the said infant for *term of their natural lives*, remainder to my brother-in-law *J. G.* and his heirs during the lives of my said sons, remainder over to *the heirs of the body of my said sons*; but in case my said sons should die *without issue*, or my wife should be delivered of a daughter, and my said son *J. W.* should die *without issue*, remainder over, &c. No other son was born, and the question was, what estate *J. W.* took under this will?

Had this been the case of a *trust-estate*, the court of *Chancery* it is true would have construed it an estate for life in *J. W.* upon the clause expressing the testator's will, that his sons should not convey a greater interest than for their lives. But as it was the limitation of a *legal* and not a *trust* estate, the court of *Chancery* itself (in conformity to its own established distinctions above explained) must have decreed it an estate-tail in *J. W.* Could this be questioned after the cases I have before cited, the cases of *L.d. Glenorchy and Boswell*, *Papillon, v. Voice*, *Coulson, v. Coulson* and *Sear and Masterman*, hereafter cited, would put it entirely out of doubt; and indeed the case of *Leonard, v. Earl of Suffex* goes directly to the point, where *A.* devised lands to trustees, that after debts ^{2 Vern. 526 .} and legacies paid, they should convey one

moiety of the residue to *H.* and the heirs of his body by a second wife, and in default of such issue to her son *F.* and the heirs of his body, the other moiety to *F.* and the heirs of his body, remainder over; *taking special care in such settlement, that it never be in the power of either of my said sons F. or H. to dock the intail of either of the said moieties given them during their or either of their life or lives:* now restraining the sons from docking the intail, was exactly the same thing as restraining them from conveying a greater interest than for their lives; for without docking the intail it was impossible they should convey any greater interest; yet the court of *Chancery* there held, and *Ld. Hardwicke*, in the case of *Bagshaw and Spencer*, afterwards observed, that if it had been a *legal* instead of a *trust* limitation, the sons would have been tenants in tail notwithstanding that restrictive clause. And *Ld. Talbot* before in the case of *Ld. Glenorchy v. Boswell* said, that in the case of *Leonard* and the *Earl of Suffex*, had it been by act *executed*, it would have been an estate-tail, and the restraint had been void; but being an *executory trust* the court decreed according to the intent as it was found expressed in the will. But the court of *King's Bench*, in a liberal spirit of improvement, soared above such *nugatory* refinements and *senseless* distinctions, and laughing at those restrictions by which a court of equity esteems itself bounden, adjudged that *J. W.* took but an estate for life. Judge *Yates* indeed from an *illiberal* habit of attachment to established laws, was of a direct contrary opinion; but his *antiquated* arguments were easily answered, by the court's observing that there were lawyers of a different *bent of genius*

2 Atk. 281.

1 Vezey 149

Cas. Temp.
19:

genius and mode of education, (from that part of the bench which concurred in the judgment) who chose to adhere to the *strict letter of the law*. However singular the disposition of judge *Tates* was in the *King's Bench*, it afterwards appeared, that the majority of the judges in the *Exchequer* chamber were influenced by the same strict attachment to established rules of law; and accordingly reversed that unprecedented decision of the court of *King's Bench*, and thereby restored the venerable train of preceding uniform judgments upon the same point, to its former authority. I shall therefore consider those judgments as once more laying claim to our attention, however idle it might have been to have mentioned them, whilst the doctrine delivered in the case of *Perrin and Blake* stood intitled to the *name of law*.

The first case I shall mention is that of *Burgett and Durdant* (a case I believe never cited but on the other side); where a devise was of lands to a trustee, and his heirs, to permit and suffer *A.* during his life to receive the profits, without impeachment of waste, and after the decease of *A.* then to the heirs-male of the body of *A.* now living, and to such other heirs, male, and female, as he should afterward have of his body. In that case it seems the first question was, whether the estate for life did not execute in *A.* by the statute of uses, for if so (says the reporter) he would be seised of an estate-tail. But the court resolved the first limitation was a trust, and not an estate executed. Now this was a point the court had no occasion to have entered into or have given any resolution upon, if the other and principal point of the subsequent limitation's vesting or not in the ancestor had

² Ventr. 311;

had not depended upon it: therefore it follows that if the estate for life had been executed, and not a mere trust-estate, the after limitation would have vested in the ancestor, notwithstanding the strong intention of the testator to the contrary. — So where a devise was to trustees and their heirs to permit *A.* to take the profits for his life, and after to the use of the heirs of the body of *A.* with power to *A.* with the consent of his trustees to make a jointure, it was adjudged that the estate for life was executed in *A.* by the statute of uses, and that he had an estate-tail executed. Now although the power of making a jointure, is itself, perhaps not a sufficient argument to exclude the intention of an estate-tail, yet, as the power in this case depended entirely on the consent of the trustees, it was a strong evidence, that the testator did not intend any legal estate at all in *A.* much less an estate-tail. — So in the case of *Lord Glenorchy v. Beville*, where lands were devised to be conveyed to *D.* for life, remainder to her husband for life, remainder to the issue of the body of *D.*; Lord Chancellor said, he should upon the first question make no difficulty of determining it an estate-tail if it were an immediate devise. — So in the case of *Papillon v. Voice*, in *Chancery*, where *A.* devised lands to *B.* for his life, without impeachment of waste, and from and after the determination of that estate to trustees, and their heirs, during the life of *B.* to preserve contingent remainders, remainder over; Lord Chancellor *King* agreed, that the intent was plain to give an estate for life only, with a contingent remainder of the inheritance, upon the clause appointing trustees to preserve contingent remainders, yet held this remainder was within the general

Broughton
and Langley,
2 Salk. 679.

Caf. Temp.
Ld. Talb. 3.

2 P. W. 471.

neral rule, and must operate as words of limitation, and consequently create a vested estate-tail in *B.*; and that the breaking into this rule would create the utmost uncertainty. — It is to be observed, that the force of these two last cases is stronger than if the words had been *heirs of the body*, because the word *issue* is not so appropriated a word of limitation as the word *heirs*, for which *vid.* 1 *Strange* 731. *Cro. Eliz.* 40. and 1 *Ventr.* 230. — Again, in the case of 2 *Stra.* 1123. *Coulson and Coulson in Chancery*, which was a devise to *C.* for life, remainder to trustees to support contingent remainders during the life of *C.* remainder to the heirs of the body of *C.*, upon a question whether *C.* took an estate-tail or for life, all the judges of *B. R.* certified, that an estate-tail in remainder vested in him. — Here it was evidently the intent of the testator, only to give an estate for life, as appears by the interposition of trustees, to support contingent remainders; for he must have intended such an estate, as might determine before the death of *C.* otherwise there could have been no room for the estate to trustees, during the life of *C.*; the testator also expressed his intention, that the heirs of *C.* should take by purchase, and not by descent, otherwise there could be no contingent remainders to be supported. And in a subsequent case of *Sear v. Masterman*, before Lords Commissioners of the Great Seal, *Willes*, *Willmot*, and *Smythe*, the like point was resolved. — Lastly, I shall mention one more case, though prior in time to several already noticed; which was a devise to *A.* and his issue, remainder to *B.* and his issue, remainder to the heirs of *A.*, *A.* died in the lifetime of the testator, and it was adjudged by the whole court, that the heirs of *A.* took nothing, because the word *heirs* was a word of limitation; the words

1 P. W. 397.

Goodright v.

Wright.

words of Lord Chief Justice *Parker*, in delivering the opinion of the court upon this case are remarkable, "and thus (says he) has the law been long clearly settled as to this point, even ever since *Brett and Rigden's* case; but on this occasion I have been the larger in delivering the judgment of the court, because of some late endeavours to invalidate this rule, which by the way may make it proper to observe, that the altering settled rules concerning property is the most dangerous way of removing land marks."

Robins. gas-
velkind. 96.
1 Vent. 230.
Cro. Eliz.
213.

1 Rep. 93. b.
Shelly's case.
2 Ld. Raym.
1440:
Goodright v.
Pulleyn.
2 Burrow.
1102. case
cited.

he ante
36.

In this place it may be proper to remark, that although words of limitation grafted on the words *beir-male* or *beir of the body*, when in the singular number, may convert them into words of purchase, as in *Archer's* case, and in the case of *Cbeek or Clerk and Day*, before cited; yet those words, though in the singular number, if not attended with words of limitation upon them, are words of limitation; and if those words be in the plural number; as *beirs-male* or *beirs of the body*; in that case, it seems, even words of limitation grafted on them will not controul their legal operation, or make them words of purchase; unless, perhaps, in such cases where the words of limitation grafted on the word *beirs*, or *beirs of the body*, &c. limit an estate of a different nature to such *beirs* or *beirs of the body*, &c. from that which the ancestor would take, if the words *beirs* or *beirs of the body*, &c. in those cases, were taken as words of limitation: as in the case of *Cbeek or Clerk and Day* above cited, where the words of limitation, (*and the beirs of such beirs*), grafted on the words *beir lawfully begotten*, limited an estate in fee, to the heir *lawfully begotten*; whereas the words *beir lawfully begotten*,

begotten, if taken as words of limitation in that case, could have given only an estate tail to the ancestor: and again in the case put by *Anderson*, 1 Co. 95. b. of a limitation to the use of a man for life, and after his decease, to the use of *his heirs*, and the *heirs-female of their bodies*; here the first word *heirs* would give a fee to the ancestor, if taken as a word of limitation, whereas the words of limitation grafted on that word *heirs*, would give only an estate-tail female to the heirs: so that in these cases, the general effect of the first words is altered and abridged by subsequent *express words of limitation* annexed to them, which could not be satisfied by construing the first words to be words of limitation.

It must be admitted that those who shall argue against the strict observance of the rule I have been speaking of, may sometimes chance to have the intention of the testator on their side; but let them consider whether a rule of law, invariably observed for more than three hundred years past, can ever be a decent sacrifice to the presumptive construction of an indetermined or illiterate testator's intention. So long as technical expressions shall be allowed their fixed legal import and operation, it will be in any man's power to secure the limitation of his property from litigation and precarious construction; by applying to those whose business it is to be acquainted with the force and import of such expressions. Where any considerable property is concerned, a man's own interest in securing the effect of his intention will lead him to such a step; where the property is so inconsiderable as not to be thought worth the trouble or expence

of

of such assistance, the disposition of that property, and of course the testator's intention with respect to it, is less material and momentous. Some cases it is true may happen wherein such application may accidentally be impracticable; but is every testator to be denied this power of effectuating his intention, because accident may put it out of the reach of some few, and some others may want inducement to use it? If no technical expressions are to be exempt from the operation of an occasional construction, where is the testator who can make his own will? The most careful and guarded endeavours which a man shall exert for that end, will only amount to leaving some precarious instructions behind him, the force and effect of which must depend on the discretion or disposition of those in whom the power of construction shall be reposed for the time being; it is their apprehension, humanity or spirit of improving old laws, must in fact *make* the will of every testator in the kingdom.

But perhaps the reader by this time may be curious to learn upon what general principles the several express authorities above cited were over-ruled. The reasons of those cases it seems were *antiquated*; every generation is expected to improve upon the preceding; and it is only for men of inferior abilities, servilely to follow and adhere to the precedents which their forefathers have left them. Great men are always ambitious to found an original merit in themselves;

_____ *quæ non fecimus ipsi*
Vix ea nostra voco. _____

From this general ground, the notions adopted by the court of *King's Bench* in their determination

tion of the case of *Perrin* and *Blake*, naturally arise: the court there held, that precedents serve only to confound, for every case ought to stand entirely upon its own bottom: that, wherever an old maxim the *policy* of which had ceased, could *justly* be departed from, it ought to be done; and that, every thing which favoured of ancient strictness ought to be discountenanced. From the operation of such principles it is easy to account for the judgment given in that case. To have attended to precedents, would have introduced confusion; to have admitted the validity of an old established maxim, would have been a solecism in *policy*: and to have countenanced any thing that favoured of ancient strictness, would have been a violence to the *liberal* tenets of modern reason and humanity. A disposition to keep clear of such errors, necessarily produced the judgment I am speaking of.

It is true, some other reasons were touched upon, in the arguments upon that case, which however, upon examination, I do not think at all support the judgment then given. It was said that the established distinction between legal estates and trusts might be attended with inconveniencies, from the difficulty which sometimes might occur in determining whether a limitation gives a trust or legal estate. This is a difficulty of that sort which rarely, very rarely, has ever occurred; and upon the long established rules of construction very rarely can occur. It is impossible indeed to say what variety of new questions new principles of construction may introduce; but certain it is, that whilst old distinctions between the words creating *trusts* and *legal estates* shall prevail; for every *single* question that can arise, as to the effect of a limitation in that respect,

2 Atk. 246.
570. 577.

respect, at least *an hundred* disputes will arise about the discretionary construction of a testator's intent: in the case of *Bagshaw v. Spencer* (as doubtful a case of that sort as probably can ever arise) the *Master of the Rolls* clearly agreed with Lord *Hardwicke*, as to its being a trust-estate, though the first denied that latitude of construction even to a *trust*-limitation which the other admitted upon the score of its being a *trust* and not a *legal* estate.

It was also observed in the same arguments, that in a commercial country, every clog should be removed which tends to obstruct the circulation of property: how the decision in question could be supported on such a ground, I am at a loss to apprehend. It is true, if the same *liberal* mode of construing wills, were to be once fully established, it would open an almost unlimited power to the judge, of disposing of the property of testators, and directing the circulation of it to his own mind; and that, I take it, is the only sense in which it could fairly be said to remove any *clog* upon the circulation of property. For if such a strange uncertainty and arbitrary fluctuation and change of maxims were to take place; if the decision of one case were not to be ruled by or depend at all upon former decisions in cases of a like nature; I should be glad to know what person will venture to become a purchaser, without first having the decision of a court of justice, respecting the identical title under which he means to purchase? No authority can be derived from precedents; former decisions upon titles of the same kind can afford him no assurance at all. Nay even a judgment of a court of justice upon the very identical title, can be but a precarious security; the principles

principles upon which it was founded, may in the course of a few years become *antiquated*; the same title may be again drawn into dispute; and a future judge may hold himself as little bounden to pay regard to the maxims and decisions of his predecessor, as that predecessor did to the maxims and decisions of those who went before him. Thus, so far from opening a door to the circulation of property, the prevalence of such a doctrine must prove the most effectual obstacle to it; for men will be very cautious how they venture upon the purchase of property, the enjoyment of which must depend wholly upon such temporary discretionary rules of construction.

Another plausible ground upon which the court seemed to lay a considerable stress, still remains to be examined. It was there laid down as a principle, that the intention of the testator should be the sole rule of construction, in all cases of devises; and that, such intention when explained, should control the legal import of any term of art. That a principle of this nature, under certain limits and restrictions, does and ought to prevail, I believe no one conversant in our laws will attempt to deny; but that such a principle has never yet been admitted in the latitude there laid down is proved beyond controversy by all the several cases I have before cited. *Vide* also, 2 *Atk.* 575-6: And that no such unlimited principle ought ever to prevail, may, I think, be clearly demonstrated from the infinite uncertainty, inconvenience, and vexation, which it must necessarily be productive of. Certain established maxims as to the legal import and effect of technical expressions will render the decisions of titles to property as little dependent as the nature of things will admit of, upon the occasional

casional opinion, humour, ingenuity, or caprice of the judge, and are therefore the most proper and sure grounds for titles to rest and depend upon. Titles so founded may be easily and clearly ascertained; and under such titles a permanent peaceful enjoyment may be expected. Such modes of ascertaining titles will not be liable to those various temporary influences, which must necessarily have a share in directing the discretionary construction of any court upon earth: few inducements therefore can arise to dispute or litigate titles built on such stable foundations. Whereas on the other hand the intention of a testator is at best uncertain; oftentimes very doubtful; favour, affection, caprice, nay different habits of thinking, and modes of expression in different men, (and judges are but men), will occasion different constructions of the same will. Very often, I'll venture to say, a testator himself would be at a loss to fix or expound his own intention, when the reason, humanity, or ingenuity of a judge, might conceive it clear as day-light. Whoever has been conversant in settling the wills of testators, must often have experienced the truth of this position; and if a testator himself is at a loss to ascertain or expound his own intention, we are certainly not to wonder that other men should differ from one another in their constructions of it. What reliance can be had on a title raised on so precarious a ground? What security of enjoyment can be expected under it? Setting aside all those grounds for differences in the construction of the same will, which may arise from different degrees of understanding, apprehension, or discernment in different men, it is certain, that different ambitions, interests,

terests, party principles, and connections, will ever lead men to differ and dispute as much about the construction of a will, as about any other act in which they are concerned. And with all due deference to the bench be it observed,

Man ne'er wants reason to confirm his will.

It is evident therefore, no sort of dependence can be had upon such titles until they have received the sanction of a court of justice; a suit commenced in one court in cases which depend upon discretionary construction, generally produces an appeal to a superior court; thus are vexatious suits continually encouraged and multiplied; innocent people perpetually harassed; and estates spent ten times over, in ascertaining the titles to them. These seem to be the necessary fruits of the unlimited principle laid down and adopted by the court of *King's Bench*, in their decision of the case of *Perrin and Blake*.

For these reasons I think it clear that the intention of the testator should never be so far indulged, as to control all established rules of construction. Wherever the construction upon the apparent intent of the testator is not contrary to the construction upon certain established legal maxims, respecting the import of terms made use of by him, so far let the apparent intent be the guide in the construction, but not one jot further; and wherever the terms of art made use of do not fall within the allowed extent of any established legal maxim respecting their import and operation, there let the intent be the sole guide of construction,

struction, because there, a more certain or better rule of construction is not sacrificed to it. These are distinctions which have long since prevailed in our courts of justice; and as founded in good reason, and permanent useful policy, it is to be hoped the supreme court of judicature in this kingdom, will not suffer them to be controlled by any temporary notions of any other court whatsoever.—Surely it is better that the intentions of twenty testators every week should fail of effect, than that those rules should be departed from, upon which the general security of titles and quiet enjoyment of property so essentially depend: for to borrow the words of my Lord *Mansfield*, as I find them in *1 Burrow* 1106. in the case of *Doe and Laming*, “It is to be lamented that questions of this kind have occasioned so much litigation and expence. The *best* way to *settle* them is to reduce the matter if possible to some *certain* rules.”

We now come to the second class of cases, which are exceptions to the last of the four descriptions of contingent remainders above given. These are grounded upon that respect which (within certain bounds) is paid to the intent of a testator wherever it can be collected from any particular expressions in his will. I mean the cases wherein a limitation in a devise to the heir special of a person living, has been adjudged a *descriptio personæ*, or sufficient designation of the person for the remainder to vest, contrary to the general rule that *nemo est hæres viventis*. But these cases have been either where the limitation to the heir special has been qualified by the words *now living*, or some other circumstances have appeared in the will to manifest the testator's

tor's intention, that the estate should vest. As ^{2 Ventr. 311.} where *A.* devised land to *J. S.* and his heirs for the life of *B.* upon trust to permit *B.* to receive the rents and profits during his life, and after *B.*'s death to the heirs-male of the body of *B.* *now living*, and to such heirs male or female as he after should have of his body; *B.* had issue *C.* a son then living, it was adjudged a trust-estate for life in *B.* and that the estate vested in *C.* immediately, and was not contingent; for that the words *now living* made the limitation a sufficient designation of the person. A like judgment was given in another case on the same will, on ^{1 Ventr. 334.} the very same point; which judgment was reversed in the *Exchequer* Chamber, and that reversal again reversed in the House of Lords, as appears in the report cited in the margin. It is to be observed, that Chief Justice *Holt* afterwards in the case of *Broughton* and *Langley* ^{2 Salk. 677.} denied the foregoing case to be law, for that the estate for life was executed in *B.* by the statute of uses, and consequently the after limitation gave him an estate-tail. — Also where there was a devise after several preceding terms of years, in remainder to the heirs of *J. S. begotten*, and *J. S.* at that time had three children living, this was adjudged a vested remainder in the eldest son of *J. S.* some stress being laid on the word *begotten*; and because the testator took notice of the ancestor's being living at that time, as well as in consideration of some other circumstances in the will from whence the court collected such to be the testator's intent. This judgment was afterwards reversed in the *Exchequer* Chamber, and that reversal again reversed in the House of Lords. As to the case of *Newcomen* and *Barkham*, the question there, was, whether a person ^{2 Vern. 729.}

should take by purchase as *heir-male*, there being another person who was heir-general then living; and not whether one should take under the description of *heir* during the life of the ancestor. We are to observe however, that there was no one of these cases in which the ancestor took the legal freehold.

Having sufficiently noticed the general exceptions, to the literal extent of the four descriptions I have above given of contingent remainders; it may now be proper to explain the distinction betwixt that kind of uncertainty which makes a remainder contingent, and an uncertainty of a different kind which appears to have been sometimes confounded with it; I mean the uncertainty of a remainder's ever taking effect in possession; a distinction not always attended to, but absolutely requisite to complete an accurate notion of what is in law considered as a contingent estate. For wherever there is a particular estate, the determination of which does not depend on any uncertain event, and a remainder is thereon absolutely limited to a person *in esse*; in that case, notwithstanding the nature and duration of the estate limited in remainder may be such, that it may not endure beyond the particular estate, and may therefore never take effect or vest in possession, yet is it not a contingent but a vested remainder. As if a lease be to *A.* for life remainder to *B.* for life or in tail, here, notwithstanding *B.* may possibly die or die without issue in the life of *A.* and consequently never come into possession, yet is his remainder vested *in interest*, and by no means comprised in the legal notion of a contingent estate.

It is not the uncertainty of ever taking effect in possession that makes a remainder contingent,
for

for to that, every remainder for life or in tail is and must be liable ; as the remainder-man may die or die without issue before the death of the tenant for life. The present *capacity* of taking effect in possession, if the possession were to become vacant, and not the certainty that the possession will become vacant before the estate limited in remainder determines, universally distinguishes a vested remainder from one that is contingent. For instance ; if there be a lease for life, remainder to *B.* for life, here the remainder to *B.* although it may possibly never take effect in possession, because *B.* may die before *A.* ; yet, from the very instant of its limitation, it is *capable* of taking effect in possession, if the possession were to fall by the death of *A.* it is therefore vested in interest, though perhaps the interest, so vested may determine by *B.*'s death, before the possession he waits for may become vacant. On the other hand, if there be a lease for life to *A.* and after the death of *J. D.* remainder to *B.* in tail ; in that case the remainder to *B.* is not *capable* of taking effect in possession, although the possession should fall by the determination of *A.*'s estate : but if *J. D.* chance to die before the determination of the particular estate, then does *B.*'s remainder by such event become *capable* of taking effect in possession when it shall happen to fall, and is then in the same state as if it had been originally limited without any regard to the death of *J. D.* This very essential alteration in the nature of *B.*'s remainder, occasioned by the timely event of *J. D.*'s death, is the change of a contingent into a vested estate ; before that event it had not the *capacity* of vesting in possession, and it was doubtful whether it ever would have

it or not ; it was therefore not vested at all : by that event it acquires the *capacity* of vesting in possession when the possession becomes vacant ; it is therefore vested in *interest*, though it is yet uncertain whether it ever will vest in *possession* ; for it is still possible that *B.* may die without issue during the continuance of the particular estate.

In short, upon a careful attention to this subject, we shall find, that wherever the preceding estate is limited, so as to determine on an event which certainly must happen ; and the remainder is so limited to a person *in esse*, that the preceding estate may by any means determine before the expiration of the estate limited in remainder ; such remainder is vested. On the contrary, wherever the preceding estate (except in the instances before noticed, as exceptions to the descriptions of a contingent remainder) is limited so as to determine on an event which is uncertain ; and may never happen ; or wherever the remainder is limited to a person not *in esse* ; or wherever it is limited so as to require the concurrence of some dubious, uncertain event, independent of the determination of the preceding estate, and duration of the estate limited in remainder, to give it a capacity of taking effect ; such remainder is contingent.

I am the more particular on this point, from a desire of preventing the errors, which must affect our conclusions upon questions of law concerning this subject, if the uncertainty of taking effect in possession should form any part of our notion of a contingent remainder : such a principle would scarcely fail to mislead us in every case of the least doubt. Suppose a lease be to *A.* for life, remainder to *B.* during

ring the life of *A.*, and the question to be put, whether this remainder to *B.* be a vested or a contingent interest? Upon the principle last mentioned, this remainder, which would be absolutely void were it not for the possibility of its taking effect by the forfeiture or surrender of *A.* must necessarily be deemed contingent; because such forfeiture or surrender, upon which its taking effect in possession entirely depends, are doubtful, uncertain events, which probably may never happen. There are instances of this sort of argument at the bar. Now, it is very true, such a remainder as I have here instanced, may never take effect in possession: it depends on a dubious uncertain event whether it shall or not, nay the probability is against it; yet, certain it is, there are not wanting cases enough in our books to prove such a remainder to be a vested interest. But this is not the only instance wherein the same principle would lead us into mistakes. It would carry us much farther, and prove many other remainders to be contingent, which have ever been undoubtedly considered as perfectly vested as any remainders whatsoever. Now, if we examine the same case by the distinctions I have laid down, we shall find it fall clearly under the description of a vested remainder; for here is a preceding estate to determine on an event which certainly must happen, (*viz.* the death of *A.*) and the remainder is so limited to a person *in esse*, that the preceding estate may by some means (*viz.* by forfeiture or surrender) determine before the expiration of the estate limited in remainder, *i. e.* before the expiration of *A.*'s life; accordingly, if *A.*'s life be not expired at the determination of the particular estate, which it will

1 Saund. 151.

3 Lev. 437.

Duncomb v.

Duncomb.

will not if *A.* should commit a forfeiture, or make a surrender, then will the remainder take effect in possession: therefore it comes expressly within the terms of the foregoing description of a vested remainder; and as this conclusion corresponds with the authorities in point, it may fairly be considered as an instance of the justness of that distinction from which we have derived it.

I am very well apprised that Lord Chief Justice *Lee*, in his argument in the case of *Smith*, on the demise of *Dormer v. Packburst et al.* as reported by *Viner*, seems to state the same case as an instance of one sort of contingent remainders, in the words following: “ 2dly, Where the
“ particular estate may determine before the re-
“ mainder can commence, as an estate to *A.* for
“ life, and from and after the determination of
“ his estate, then to *B.* during the life of *A.*
“ this is good by contingency, that is if *A.*
“ forfeit his estate by alienation, or otherwise, in
“ his lifetime.” This passage, I observe, is cited *verbatim* in the definition of a contingent remainder, in *Bacon’s Abridgment*. I wish its force had been duly weighed before it had been offered to the reader in that detached form, which must necessarily mislead him. The argument at large, as reported by *Viner*, is not always at hand; the quotation, as it stands detached in *Bacon*, has nothing to impugn or invalidate its authority: though a small degree of attention to the case itself will convince us, that the passage I have quoted is misreported. To prove this, I shall only cite the following passage, which occurs a few lines lower in the same argument:
“ As a lease to *A.* for life, remainder to another
“ during the life of *A.* this is good, because by
“ possibility

Bac. Abridg.
vol. iv. p.
306. in the
margin.

" possibility the remainder may take effect, by
 " the tenant's for life alienating or committing a
 " forfeiture ; this possibility is therefore con-
 " sidered as an interest in the grantor, which he
 " may limit, and is that sort of interest which
 " the trustees have for preserving contingent
 " uses, and is not a mere right of entry, *nor a*
 " *contingent remainder, but a vested estate*, to
 " take effect by those ways and methods of de-
 " termination to which the particular estate was
 " subject when it was created." This last pas-
 sage goes directly to the point, and is conclu-
 sive : it expressly states the very same case, and
 affirms, that such remainder is not a contingent
 but a vested estate, to prove which several au-
 thorities are there cited ; for all which I refer
 the reader to the argument itself. Agreeable to
 this idea was the judgment given in that case, so
 far as it respects the point I am now consider-
 ing ; which judgment was afterwards affirmed in
 the *House of Lords*. It is evident therefore, the
 first cited passage must be erroneous, and I should
 therefore have passed it over without notice, had
 I not apprehended it might have been mistaken
 for an authority, by those who should meet with
 it detached from the case at large.

Vin. v. 18.
 fol. 413. pl. 8.
 3 Atk. 135.

The above-mentioned case of *Smith* on the
 demise of *Dormer v. Parkhurst et al.* was a limi-
 tation in remainder (after several preceding
 estates for life and in tail) to the use of *A.* for
 99 years if he should so long live, and from and
 after the death of *A.* or other sooner determina-
 tion of the estate limited to him for 99 years,
 to the use of trustees and their heirs during the
 life of the said *A.* upon trust to preserve contin-
 gent estates, &c. and for that purpose to make
 entries and bring actions, &c. but to permit the
 said

said *A.* to receive the rents and profits, &c. during the term of his life; and after the end or other sooner determination of the said term, to the use of the first and other sons of *A.* successively in tail-mail, with divers remainders over. By the expiration of all the preceding estates *A.* came into possession of the estate limited to him for 99 years; and having a son, he, together with that son, when he came of age, levied a fine of the lands to make a tenant to the *præcipe*, and suffered a recovery of the same, in which the son was vouched. The son died without issue, and afterwards *A.* died without leaving any other son: the next surviving remainder-man made his actual entry within five years, and the question was, Whether the recovery had barred his remainder? which depended solely on another question, Whether the freehold was in the trustees during the life of *A.* or not? For if it was, the recovery was not well suffered for want of a good tenant to the *præcipe*, and consequently did not bar; but if the trustees had not the freehold, then it was in the son, and of course he was capable of making a good tenant to the *præcipe*, and the recovery in that case was well suffered: for the court held that the fine by lessee for years (*A.*) or the reversioner (the son), could only operate by way of estoppel, to bar the parties claiming under such lessee or reversioner; but did not get the freehold as a feoffment would have done. To prove that the freehold was not in the trustees, it was insisted, 1st, That the remainder to the trustees was void in its creation, because to commence after *A.*'s death, and then hold during his life, which was repugnant, and could never take effect at all: 2^{dly},

If not void in its creation, it was a contingent remainder, because it was uncertain whether it ever would take effect, as the term of 99 years might not determine in *A.*'s lifetime. *3dly*, That if neither void nor contingent, yet it did not amount to a legal estate, but was only a right of entry. But the court resolved that the remainder was not void in its creation, its commencement not being restrained to the death of *A.* but limited from the death of *A.* or other sooner determination of the estate for 99 years, and therefore might take effect by surrender, forfeiture, or effluxion of time, in *A.*'s lifetime. *2dly*, That it was not a contingent remainder, being limited to persons *in esse*, without any condition precedent to be performed, but only depending on such facts as might determine the particular estate from the nature of the estate itself. *3dly*, That it was not a mere right of entry, but a legal estate, for a grantor cannot reserve a right of entry to a stranger, nor can a right of entry subsist without an estate. Therefore the trustees had the freehold for the life of *A.* And upon the whole the court held that the fine and recovery did not bar the remainder. It is to be observed, this very case, so far as respects the question, whether the remainder to the trustees was contingent or not, falls directly within the distinctions I have above laid down, and is capable of being resolved by them in the same manner and with the same facility as the case I have before instanced.

It sometimes happens, that contingent remainders intervene between the particular estate and other limitations over; upon which cases we must observe, that wherever a contingent remainder

1 Rep. 133.
Chudleigh's
case. Vide
also Hutton
119.

11 Rep. 80.
Lewis Bowle's
case.

2 Roll. Abr.
111. Uvedal
v Uvedale.
But Chancery
will not per-
mit this collu-
sive waste, to
the prejudice
of sons not in
esse. Vid.
hereafter.

mainder is limited, which is followed by another limitation over, if the contingent limitation be not in fee, the subsequent limitation may be vested, if it be made to a person *in esse*. As a feoffment to the use of feoffor for life, and, after his death, to the use of his first and other sons in tail; remainder to divers, and afterwards to *J. D.* in tail; the feoffor having no sons at the time of the feoffment, it was resolved that all the uses limited to persons not *in esse* were contingent; but the uses to persons *in esse* vested immediately, and that the contingent uses when they should come *in esse*, would vest by interposition, if the estate for life, which ought to support them, were not disturbed. So where, in the same conveyance, an estate for life is limited to a person, and after that a contingent remainder to another, followed by a remainder to the heirs or heirs special of the first tenant for life; this last limitation shall be esteemed executed only *sub modo*, that is, upon such condition as to open and separate itself from the first estate for life when the contingency happens. So a subsequent contingent remainder may become vested before a preceding one, and the preceding one will be no obstruction to its vesting: as where *A.* was tenant for life, remainder to his first and other sons in tail-male successively, remainder to *B.* for life, remainder to his first and other sons in tail-male; then *B.* having issue a son, and *A.* no son, *A.* cuts timber trees, the son of *B.* who is then tenant in tail, shall have them, for the property thereof is in him by reason of his inheritance, and the remainder to the first and other sons of *A.* is no impediment, being but a possibility which may never happen.

But

But where there is a contingent limitation in fee, no estate limited afterwards can be vested; as a devise to *A.* for life, without impeachment of waste, and if he have issue-male, then to such issue-male and his heirs for ever, and if he die without issue-male, then to *B.* and his heirs for ever; in that case the court held the remainder to *B.* and his heirs not vested, because the precedent limitation to the issue of *A.* was resolved to be a contingent fee; and they took the distinction I have stated; that where the mean estates limited are for life, or in tail, the last remainder may, if it be to a person *in esse*, vest; but that no remainder limited after a limitation in fee can be vested.

But it seems a contingent determinable fee, limited to trustees for some special purposes only, will not prevent an after limitation to one *in esse* from being vested. As where *A.* devised lands to his daughter for life, remainder to trustees to support contingent remainders, remainder to her first and other sons successively in tail; and if his daughter should depart this life without issue of her body *living at her death*, then he devised the lands to trustees and their heirs until his cousin *N.* should attain his age of 21 years, upon trust &c. *Item*, he gave and devised the lands to his cousin *N.* after he should have attained his age of 21 years for the term of his life, remainder to trustees to support contingent remainders, remainder to the first and other sons of *N.* successively in tail &c. and in default of such issue, or in case *N.* should die before 21 and without issue, remainder over. Lord *Hardwicke* held that the contingency of the daughter's dying without issue living at her death, affected only the estate limited to trustees until *N.* should attain

1 Salk. 224.

Lord Raym.

209. Lod-

dington v.

Kime.

3 Atk. 774.

Tracy v. Le-

thulier.

attain 21; that this limitation to trustees was not an absolute fee, as was contended but a determinable fee; that the estate limited to N. was only contingent until he should attain 21; and that this contingency extended to none of the subsequent estates, and therefore the remainders over to persons *in esse* were vested. From this case we may observe, that a contingent determinable fee to trustees does not prevent the vesting of a subsequent limitation, to a person *in esse*.

Where a contingent remainder is limited on a condition annexed to the preceding estate, and that preceding estate never takes effect, it seems agreed, that the remainder shall nevertheless take place: according to the opinion of Lord *Hardwicke*, in the case of *Avelyn* & *Vezey* 422. v. *Ward*; who said he knew of no case of a remainder or conditional limitation over, of a real estate, whether the first limitation were by way of a particular estate, so as to leave a proper remainder, or the conditional subsequent limitation, were to defeat an absolute fee before limited: but if the precedent limitation, by what means soever be out of the case, the subsequent limitation should take place. As most of the cases which occur upon this point are such, wherein the whole fee was first limited, I shall postpone the further consideration of them to the chapter of executory devises; only observing in this place; that if such a conditional remainder is not defeated by the failing of the preceding estate, in those cases wherein the whole estate is first limited; *a fortiori* it should not be defeated, in the cases where the whole fee was not at first limited, but the remainder though conditional,

conditional, is the residue of the estate not before otherwise disposed of.

But though where a remainder depends on a condition annexed to a preceding estate, and that estate fails, the remainder shall nevertheless take place; yet where such preceding estate takes place, and the condition is not performed, the remainder will not take effect at the expiration of the preceding estate; unless in some cases of devises, where it appears to be the general intention of the testator that it should. For tho' it was contended at the bar, in the case of *Sheffield v. Lord Orrery*; that, where a testator gives a particular estate to a person, and after gives the remainder over, upon a contingency, which is to determine the particular estate, sooner than it would otherwise determine; there though the contingency does not happen, nevertheless the limitation over shall be good after the determination of the first estate: yet Lord *Hardwicke* observed, there was no such rule; for that all the cases which could be put, depended on particular words, and the intent of the party: and to prove it, cited a case of where *A.* devised his estate to his son in tail, remainder to *B.* for life, on condition he should change his name, and if he did not, gave the estate over to *D.*: the son died without issue, *B.* performed the condition and died; and upon a question whether *D.* should have the estate after *B.*'s death; the judges of *K. B.* were of opinion, that on the death of *B.* the remainderman took no estate, but it went to the heir at law of *A.*: which opinion was confirmed by the House of Lords in 1729. And my Lord *Hardwicke* accordingly in the case of *Sheffield v. Lord Orrery*, where *A.* devised his house &c. 3 Atk. 282.

3 Atk. 282.

Amhurst v.

Litton.

In Chanc.

1727.

to his wife for life, upon this express condition, that if she should marry again, then, that the house, &c. should go forthwith to his eldest son and his issue, and if all his issue-male should die, remainder over; held that it was not a vested remainder in the son, but a contingent one, and to take effect only if the wife of the testator should marry again; because, upon the circumstances of that case, the other construction was unnecessary, or rather improper, to effectuate the testator's intent.

3 Lev. 125.
Raym. 427.
Brown v.
Cutter.

It is true in the case of *Luxford v. Cbeke*, where *A.* devised his estate to his wife for life, if she should not marry again, but if she did, then, that his son *H.* should presently after his mother's marriage, enter, and enjoy the premises to him and the heirs-male of his body, remainder to testator's other sons successively in like manner, remainder over: the wife survived the testator, and died without marrying again: the question between the heir-general of the testator, and the heir-male of one of the sons, was, whether the condition not having been performed, the remainder to the sons in tail, took effect? The court held that it did; for that by the whole scope of the will, the testator intended an intail, and rather than the intent of the testator should be defeated, the court construed the devise to the wife, to be the same as a limitation to her during widowhood, remainder over &c. to commence on the determination of the wife's estate, whether by marriage or death.

Sometimes a remainder is limited in words which seem to import a contingency, though in fact they mean no more than would have been implied without them, or do not denote a condition precedent, but only mark the time when

when the remainder is to vest in possession. As an estate to *A.* for life. and afterwards to his first, second, third and fourth sons in tail, and if his fourth son die without issue, then to *B.* this is a remainder vested in *B.*; for it is the same thing as if it had been said *remainder to B.* The fourth son's dying without issue is implied; it is not a condition, but an expression of the time when the remainder is to vest in possession. So a devise of *Blackacre* and *Whiteacre* to *M.* for life, and after her death, *Blackacre* to *B.* and his heirs for ever, and *Whiteacre* to *C.* and his heirs for ever; *Item*, I will, that the survivor of them shall be heir to the other, if either of them die without issue: this is an immediate estate-tail with remainder limited over; for the subsequent clause restrains the first limitation, and the words *if either of them die without issue* mark the time when the remainder over to the other is to take effect in possession; but if it had been, *if either of them die without issue, living the other, or before such an age*, the remainder would then have been contingent.

Moor 487.
Holtcroft's
case.

Cro. Ja. 695.
Chaddock v.
Cowley.

Vide Cro. Eliz.
26. Lee v.
Vincent.
Raym. 28.
Plunkit v.
Holmes.
Cro. James
416. Web v.
Herring. 697.

Foy and Hynde. Raym. 428. 1 Salk. 229. Scatterwood v. Edge.
Gilb. Eq. Rep. 74. Jones v. Westcomb. 1 Wilson, 105.

Some instances are to be met with where the contingency, upon which the remainder was limited has been considered as a condition subsequent instead of precedent, so that the remainder vested immediately subject to be defeated by the condition when it should happen, in the room of not taking effect till it happened. Thus, where a fine was levied to the use of *A.* and his heirs, if *B.* should not pay 10*s.* to *A.* before a certain day, and if he should, then to the use of *A.* for life, remainder to the use of *B.* in fee; the condition in this case was held a condition

1 Roll. Abr.
415. pl. 12.
Spring and
Caesar.

2 Show. 398.
 Stocker v. Edwards.
 Vide also 3
 Lev. 132.
 Edwards v.
 Hammond.

subsequent with respect to *A.* so that he took an estate in fee until *B.* paid the 10*s.* Here it was evidently the intent that one of the limitations should take effect immediately; the latter could not take place till the 10*s.* paid, therefore it must be the first. So where there was a surrender to the use of the youngest son, and the heirs of his body, if he attained the age of eighteen, and if he died before eighteen without issue-male, then to the right heirs of *A.* it was held to be a condition subsequent with respect to the youngest son; and therefore the remainder vested immediately, subject to be defeated by the condition of his dying without issue-male before he attained the age of eighteen. Here it was evidently the intent, that the estate should not go to the heirs of *A.* if the youngest son died before eighteen leaving issue; but if the estate was not to vest till he attained eighteen, this intent could not have been satisfied. Constructions of this sort, however, are only allowed where the limitations are by way of use, as they really are nothing but shifting uses, of which *vide* in the next section.

Of the Nature of the Contingency upon which a Remainder may be limited.

IN the limitation of contingent remainders it is necessary that regard be paid to the nature of the contingency upon which the remainder is intended to take effect; for that contingency may be liable to four capital objections, any one of

of which would be sufficient to render the depending remainder absolutely void.

The objections may be as follow :

1st, The contingent event's being an illegal act.

2^{dly}, The remote probability of the contingent event.

3^{dly}, The condition's being repugnant to the preceding estate

4^{thly}, The condition's enuring to defeat the preceding estate

As to the first objection, Lord Coke tells us, ^{2 Rep. 51.} the law will never adjudge a grant, by reason of ^{Vid. also 1} a possibility or expectation of a thing which is ^{Leon. 189.} against law, for the same is *potentia remoti* ^{pl. 289.} *ma*, and which by intendment of law *nunquam venit in actum*; of this nature was the possibility of a man's entering into religion by becoming professed. Upon the same principle, a limitation to a bastard not *in esse* is held to be void; for the law does not favour such generation, or expect ^{So a remainder on condition to kill a man is void. Plowd. 32.} that such should be.

As to the second point, it is requisite that the possibility upon which a remainder is to depend should be a common possibility and *potentia propinqua*, as death, or death without issue, or coverture, or the like. Therefore a remainder to a corporation, which is not in being at the time ^{2 Rep. 51.} of the limitation, is void, although it be erected during the particular estate. But if during the vacation of the mayoralty of *D.* a lease for life ^{1 Inst. 264. a.} be made, remainder to the mayor and commonalty of *D.* this remainder is good if there be a mayor of *D.* elected during the estate for life. So if there be a lease for life, remainder to the heirs of *J. S.* though this remainder be good, because by common possibility *J. S.* may die

2 Rep. 51.

during the particular estate, yet if there be no such person as *J. S.* at the time of the limitation; notwithstanding such a person should afterwards be born, and die during the life of the tenant for life, his heir shall not take by virtue of such limitation; because the possibility on which it is to take effect is too remote; for it amounts to the concurrence of two several contingencies, *viz.* *First*, That such a person as *J. S.* should be born, and *Secondly*, That he should also die during the particular estate; this is called a possibility upon a possibility, which Lord *Coke* tells us is never admitted by intendment of law.

1 Inst. 25. b.
184. a.

2 Rep. 51.

Upon the same ground ariseth the distinction between a remainder limited by a general name, and one limited by a particular name to a person *not in esse*. In the first case the remainder is good, as a limitation to the right heirs of *J. D.* who is alive, or *primogenito filio* of *B.* who has no son then born; but in the other case the remainder is void; as if a remainder be limited to *G.* son of *D.* in that case if *D.* hath not a son named *G.* at the time of the limitation, the law will not expect he should afterwards have a son so named, because it amounts to a possibility upon a possibility.

1 Rep. 83.

b. 130. a.

6 Rep. 42.

Mildmay's
case.

2 Ventr. 321.

Cro. Ja. 696,

and vid. 2

Leon. 38.

Moor. 271.

Spittle v.

Davis.

As to the third point we are to observe, that there are certain conditions which are held repugnant to, and incompatible with, the nature of an estate-tail; such as a condition not to levy or attempt to levy a fine, or suffer a common recovery; and wherever an estate is limited to take effect on the breach of any condition of that nature, such limitation is void of course; as if a man make a feoffment to the use of himself for life, remainder to his eldest son in tail, provided that

that if his eldest son attempt to levy a fine or suffer a recovery, that then his estate shall cease as if he were naturally dead, and remain over to another; in this case the proviso is repugnant and therefore void.

With respect to the fourth and last objection, it is laid down as a rule in conveyances at common law, that every remainder must be so limited as to wait for the determination of the particular estate before it is to take effect in possession; and not to take effect in prejudice or exclusion of the preceding estate. This rule depends on a maxim at common law, that none shall take advantage of a condition but the party from whom the condition moves (*i. e.* the grantor) and his heirs; now if he or his heirs take advantage of a condition by entry or claim; the livery made upon the creation of the estates, is defeated, and of course every estate then created, is thereby annulled and gone. But the remainder ought to vest at the instant of the expiration of the preceding estate; and at that instant we see both preceding estate and remainder are defeated by the entry of grantor. Therefore such remainder is void. It follows that a remainder cannot be limited to take effect upon a condition which is to defeat the particular estate, whether such condition be repugnant to the nature of the estate to which it is annexed or not.

Thus for instance, if a lease for life be made upon condition, that if a stranger pay to the lessor 20 *l.* then immediately the land shall remain to the same stranger, this remainder is void; for the tenant for life ought to have it during his life, and if so, during that time the stranger cannot have it; for he can take no advantage

Plowd. Com.
24. b.
Vide Dr. and
Stud. lib. 2.
cap. 21. Perk.
f. 831. 1 Inst.
214.

Plowd. Com.
29. b.

vantage of the condition, but only the grantor or his heirs ; but had it been limited, that if a stranger pay to the lessor 20 *l.* then, after the death of tenant for life, it should remain to that stranger, it would have been a good remainder.

—— The distinction between the two cases is this, in the latter the remainder is not to vest in possession till after the determination of the estate for life, when it may vest of course : in the former it is limited to take effect in possession on the performance of a condition, which is to defeat the estate for life, and of which the remainder-man cannot avail himself ; and not to wait till the particular estate be determined, which *ex vi termini* every remainder ought to do. — Here we are to observe, that if land be leased to one for life, &c. and if such a thing happen then to remain to B. &c. ; this shall not be understood as intended to vest in possession, immediately upon the happening of the condition, and in abridgment of the preceding estate ; because under that construction the remainder would be void for the reasons already given ; but it shall be construed, to vest in interest upon the happening of the condition, and to remain as a remainder ought to do, that is so as to wait the determination of the preceding estate before it comes into possession. As if a gift in tail be made to one upon condition that if he do such an act, then the lands shall remain to his right heirs ; the word *then* is not so to be understood, as to avoid the estate-tail, and execute the fee-simple in possession immediately on performance of the act, but must be taken in this manner ; *viz.* that upon performance of the act, the remainder in fee shall vest in him, not to be executed in possession till the expiration of the

Plowd. 32. in
the case of
Colthurst v.
Besushin.

the estate-tail.—So if there be an estate to husband and wife for their lives, remainder to *B.*, and if *B.* die before the husband and wife, then to remain to *C.* ; this would be a good remainder to *C.* to take effect in possession after the determination of the preceding estate ; but it would have been void if it had been, that then from the death of *B.*, *C.* should have the lands during the lives of husband and wife; upon the principles before laid down.

The same law holds with regard to a remainder limited to take effect on a condition which is to defeat a preceding remainder ; as where *A.* seised in fee let to *B.* for life, remainder to *C.* for life, provided that if *A.* should have a son which should live to the age of 5 years, the estate limited to *C.* should cease, and the land remain to that son in tail ; it was adjudged, the estate limited to the son was void, because limited on a condition which was to defeat the preceding remainder to *C.*

But here we are to distinguish between the cases, where a remainder is limited to take effect upon a condition which is to defeat the preceding estate ; and other cases where the preceding estate is limited subject to a condition, but the remainder is limited without any dependence at all upon that condition. In the first cases we have seen the condition makes the remainder void ; but in the latter it seems the remainder destroys the condition : as if a man lease to *A.* for life upon condition, (of payment of rent and re-entry, &c.) remainder over, *Roll. Abr.* 1. d. pl. 3. pl. *Roll.* says the condition is destroyed. Now in this case we observe, the remainder is limited absolutely, without any dependence at all upon the condition annexed to the particular estate : *4. P. d. pl. 2.* *pl. 9. Brook.* *Cond. pl. 111.* *Bac. Abr. 4.* *319.*

but

Lit. f. 347.

but if the condition annexed to the first estate were good in this case, the grantor's entry for breach of it, would defeat the remainder, upon the principles before laid down; now it is unreasonable that the grantor should defeat that estate in remainder which he had absolutely granted away. Indeed it seems expressly within the reason of the case put by *Littleton*; that if a man lease for life upon condition of re-entry for default of payment of rent, and the lessor afterwards grants his reversion, the lessor or his heirs cannot enter, because he hath aliened the reversion: so in the above case the lessor by limiting the remainder over absolutely, hath departed with the reversion as much as if he had afterwards aliened it by another conveyance.

Perk. f. 563.
Dyer 127.

I have not met with any case determined expressly upon this point, where the limitation was by conveyance at common law; and where the limitation was by devise, there seems formerly to have been some difference in our books. Some took a distinction, upon this principle; that though in the case of a conveyance at common law the entry for condition broken, must defeat the livery, and of course the remainder which took effect from it; and therefore the remainder in that case when limited without dependence on the condition should be construed to destroy the condition annexed to the preceding estate: yet that in case of a devise where the estates took effect without livery, there was not the same reason that the entry for the condition broken should destroy the remainder; but that such entry might in that case affect only the particular estate, and the remainder nevertheless take place at the time limited for it to commence; and therefore the remainder need not absolutely destroy the condition,

dition, but that the heir should enter for breach of the condition, and retain only till the remainder should take place: whilst others considered the condition in the case of a devise absolutely destroyed by the remainder over, no less than in the case of conveyance at common law. But that question has long since ceased, and it is now agreed, that wherever in a devise a condition is annexed to the particular estate, that condition shall operate as a limitation, circumscribing the continuance and measure of the first estate; and that upon the happening, performance or non-performance of it, the first estate shall *ipso facto* determine and expire, without entry or claim; and the remainder shall thereupon actually commence in possession, and the remainder-man, whether heir or stranger, have immediate right to the estate. Thus indeed is the testator's intention effectuated, by substantiating the remainder, though limited to a stranger; and enforcing the performance of the condition, by the determination of the particular estate upon the breach of it, notwithstanding that particular estate be limited to the heir himself. As, where one devised lands to his mother for life, and after her death to his brother in fee, provided that if his wife (being then *enfeini*) be delivered of a son, that then the land should remain to him in fee; the testator died, a son was born, and it was held that the fee of the brother should cease, and vest in the son upon the happening of the contingency. — Again, where A. devised lands to his wife for life, and after her death to his grandchild B. and the heirs of her body; *provided always and upon condition* that she married with the consent of D., E. and F.

Plowd. 412.

10 Co. 41.

Vide Plowd.

408. Newis

v. Lark.

Dyer 127.

in margin.

1 Vent. 199.

Lady Anne

Fry's case.

E. or the major part of them; and in case she should marry without such consent, or die without issue, then he devised the premises to *C.* (neither *B.* nor *C.* being heir at law to the testator). After the testator's death *B.* married without the consent of any of the persons named for that purpose; and it was clearly held to be a limitation to *B.* till she married without such consent, and not a condition; for if it were, it would descend to the heir at law, and he might enter for breach of it, and defeat the limitation over; and it was therefore agreed that the marriage without consent determined her estate-tail, and cast the possession on *C.* by way of immediate remainder. — So where one devised lands to *A.* his heir at law, and other lands to *B.* in fee, and that if *A.* molested *B.* by suit or otherwise, he should lose what was devised to him, and it should go to *B.* After the testator's death *A.* entered on the lands devised to *B.* and claimed them; and it was held that this was a sufficient breach to give title to *B.* and that the condition imposed on the heir should not be taken as a condition; because, if so, by descending on him who alone could enter for the breach of it, it would in this case be fruitless and defeated: but it was held to be a limitation which determined the heir's estate, and cast the possession on *B.* without entry.

Therefore when it is said that a remainder limited on a condition which is to defeat the preceding estate is void, the rule must be understood only of remainders created at common law; for that such a remainder may be good by way of devise, is clear from the cases last cited, and will further appear in the chapter of Executory Devises.

And it also appears, that by way

way of use an estate may be limited to cease as to one person upon a future event, and at the same time vest in another. As if a man make a feoffment in fee to the use of *W.* and his heirs till *A.* pay 40*l.* to the said *W.* and then to the use of the said *A.* and his heirs, and the statute executes the estate in *W.* and afterwards *A.* pays the 40*l.* there *A.* is seised in fee if he enters, by the opinion of several; but by some, *A.* shall not be seised in fee by the said payment unless the feoffees enter; therefore it seems to be the surest way to enter in the name of the feoffees and his own name; and therefore it appears that a man at this day may make a feoffment to uses, and that the use shall change from one to another by act *ex post facto*, by circumstance, as well as it would before the statute 27 *H.* 8. of uses: thus says *Brook* in the place I have cited.

Brook Feoffal Uses, pl. 30.

So where *A.* tenant in tail by indenture bargained and sold the lands to the use of *J. S.* in fee, in the indenture was a letter of attorney to make livery, which was made accordingly; *J. S.* by the same indenture covenanted, that if *A.* before such a day paid 40*s.* that then *J. S.* and his heirs should stand seised, &c. to the use of *A.* and his heirs, and if *A.* did not pay, &c. then if the said *J. S.* did not pay to the said *A.* within four days after 10*l.* that *J. S.* and his heirs should thenceforth be seised to the use of the said *A.* and his heirs, &c. and *A.* covenanted for further assurance; both failed of payment, *B.* levied a fine to *J. S.* without any consideration. It was adjudged a good feoffment well executed by the livery, notwithstanding the words of bargain and sale only, and that the covenant to be seised to the new uses conditionally

Leon. 25. pl. 21.
Benfionbe v. Parker.

tionally upon the payment and non-payment, being in one and the same deed, should raise the use upon the contingency according to the limitation of it. — So where one made a feoffment, and it was declared by the indenture that it should be to the use of himself, and *A.* his *ferne that should be* after their marriage, and the heirs of their bodies, and he took *A.* in marriage; all the judges held, that although he were seised in fee in the mean time, yet, by the marriage, the new use should arise and vest, if there were no act in the mean time to destroy that future use, (as it was in *Chudleigh's* case) and judgment was given accordingly. — For more instances of such uses, *vide* the cases cited in the margin.

The uses I have been speaking of are called shifting or secondary uses, and are allowed, because they were good before the statute 27 *Hen.* 8. of uses, (when uses were fiduciary and totally distinct from the legal estate, which at common law could not be limited in such manner,) and do not fall within any of the mischiefs which that statute was made to remedy: it seems however a question whether they are good in surrenders of copyhold estates; for the use upon a surrender of a copyhold, was not like a use or trust at common law: but he who was admitted upon a surrender, was admitted to the legal *customary* estate, and was not seised to a use; therefore uses upon surrenders were governed entirely by the same rules, as conveyances at common law, in which such limitations were not allowable; nor could a fee be limited upon a fee in case of a surrender of a copyhold, any more than of a conveyance at common law.

There

Cro. Eliz.

439.

Woodliff v.

Drury.

Dyer 314. pl. 96.

Roll. Abridg.

415. pl. 12.

Ley 54. Moor

99. pl. 243.

2 Leon. 221.

pl. 281.

Vide Cro.

Jac. 376.

Gilb. Ten.

244.

LexCust. 120.

And vid. con-

tra. 2 Show.

298. Stocker

v. Edward.

There are also some instances of estates not copyhold, wherein these uses have not been admitted to arise; as where a feoffment was to the use of *A.* for life, remainder to his wife for life, remainder to his right heirs, with a proviso that if his son interrupted his wife it should be to the use of his wife and her heirs; *A.* made a lease for years to commence after the death of his wife, and died, the son disturbed the wife, and it was resolved that the uses would not arise to give the wife the fee. The lease for years made to commence after the death of the wife is said to have been the reason of this judgment, for the reversion after the death of the wife being altered by that lease, the same use in the reversion which was in being at the disposition of the particular estate, and so conditionally limited to the wife, could not arise to her, and therefore could never arise at all.—So if a limitation be to the use of *A.* and his heirs, provided that if he give a mortal blow to any person, that the use shall cease to him, and shall be to another; this is fraudulent to prevent an escheat, and therefore is void.—And where *A.* bargained and sold land to *B.* for 500 *l.* upon condition that if *A.* paid *B.* 500 *l.* he might enter, and be seised to the use of himself and his heirs, until he should attempt to alien without the assent of *B.* and then to the use of *B.* and his heirs; and a fine was levied to those uses; *A.* paid the 500 *l.* and entered, afterwards *A.* aliened without the assent of *B.* *Per Lord Chancellor Egerton*, No use will arise to *B.* the bargaineer, because the bargainer, entering for the condition, ought to be in of the old use and estate, and cannot be seised to any other use; also the fine was levied to *B.* by which *A.* who was the con-

Moor 742.

pl. 1022.

Gilb. uses,

138.

Moor 633.

pl. 868.

Moor 761.

pl. 1054.

nufor, and alfo the bargainor, who came in by the ufe of the fine cannot ftand feifed to any other ufe, for then there would be ufe upon ufe. — But we are to obferve the judgments in thefe laft cafes depended on the particular nature of circumftances *ex poft facto*, or on the fraudulent intent or illegality of the condition; and do not in the leaft affect the general validity of thefe fhifting limitations.

There is alfo a limitation of another kind, which may be confidered as an exception to the rule at common law, that a remainder limited on a condition, which is to deftroy the particular eftate, is void. I mean, where a particular eftate is limited with a condition, that after the performance of fuch an act, or the happening of fuch an event, the perfon to whom the firft eftate was limited, fhall thereupon have a larger eftate. For it was refolved in the cafe of Lord *Stafford*, that fuch a grant may be good, as well of things which lie in grant, as of things which lie in livery; and may be annexed as well to an eftate-tail, which cannot be drowned, as to an eftate for life, or years, which may be merged by the accefs of a greater eftate. But that fuch increafe of an eftate by force of fuch a condition, ought to have four incidents. — *1^{ft}*, There ought to be a particular eftate as a foundation for the increafe to take effect upon; which particular eftate Lord *Coke* held, muft not be an eftate at will, nor revocable, nor contingent. — *2^{dly}*, Such particular eftate ought to continue in the leffee, or the grantee, until the increafe happens, without any alteration of privity in eftate; by alienation of the leffee or grantee; though the alienation of the leffor or grantor, will not at all affect it; and that the alteration

1 Rep. 74.

of persons, by descent of the reversion to the heirs of the grantor or his alienee, or of the particular estate to the representatives of the grantee, shall not avoid the condition; and that where the grantee dies before performance of the condition, his heir shall, after he has performed the condition, be in *quodam modo* by descent: and that such increase need not take place immediately upon the particular estate, but may enure as a mediate remainder, subsequent to an intermediate remainder for life, or in tail to somebody else.—3^{dly}, That the increase must vest and take effect, immediately upon the performance of the condition; for that if an estate cannot be enlarged at the very instant of time appointed for enlargement, the enlargement shall never take place; and therefore though the reversion be in the King, it shall instantly be out of him, upon performance of the condition, and vest in the grantee, without petition or *monstrans de droit* or other circumstance; for the awaiting such circumstances, would frustrate and defeat the enlargement; and the law will never require circumstances to subvert the substance.—4^{thly}, That the particular estate, and the increase ought to take effect by one and the same instrument or deed, or by several deeds delivered at one and the same time; (which in effect is the same thing, for *quæ incontinenti fiunt inesse videntur*) because the particular estate, and the increase thereupon, is only a grant to take effect out of one and the same root; and though the increase vest at a different time, yet when it is vested, it has its force and effect from the same grant. For a more minute discussion of this doctrine, I shall refer the reader to my lord Coke's report of the case above cited.

Of the Estate necessary to support a Contingent Remainder.

I Shall now consider what estate is required to support a contingent remainder; or, in other words, what kind of estate must necessarily precede it.

1 Rep. 130.
Vid. also Barrington's case.
3 Rep. 20.

It is a general rule, that wherever an estate in contingent remainder amounts to a freehold, some vested estate of freehold must precede it. This rule depends upon the necessity there is for the freehold to pass out of the grantor at the time the remainder is created. If no freehold passeth how is the remainder man to have it? If it passeth at all, it must pass either in the particular estate or in some remainder limited after it; in a contingent remainder it cannot pass because such remainder at the time of its creation passeth to or vests in nobody; and if it passeth only in some vested remainder limited after the contingent remainder, then is such contingent estate precluded from ever rising at all; for that freehold then becomes vested in possession, which the contingent estate was limited to precede, and of course there is no room left for the introduction of the contingent freehold. It follows therefore that some preceding vested estate of freehold must be limited, to give existence to such a contingent remainder.

1 Salk. 229.
Scatterwood v.
Edge.

Thus, where there was a devise to trustees for 11 years, and then to the first son of *A.* in tail, &c. and *A.* had no son at that time, it was agreed that such limitation was void as a contingent remainder,

remainder, because there was no freehold to support it — So where a devise was to *B.* for 50 years if he should so long live, remainder to the heirs of the body of *B.* remainder to *C.*; the limitation to the heirs of the body of *B.* was void for want of a freehold to support it. — But where an estate was limited to a *A.* for 20 years, remainder to trustees during the life of *A.* remainder to the wife for her jointure, remainder to the heirs of the body of *A.*; there, though the particular estate was but for years, yet the contingent remainder to the heirs of the body of *A.* was good, because preceded by a vested freehold remainder to the trustees.

1 Salk. 226.
Goodbright v.
Cornish.

2 Vern. 754.
Elie v. Osburn.

The same rule holds good as well in the limitation of uses as in estates executed in possession: though before the statute of uses, a use limited to *A.* for years, remainder in contingency, would have been good, for the feoffees remained tenants of the freehold; but since that statute it is otherwise, for now no estate remains in the feoffees. —

1 Rep. 134-5.
Show. Caf.
Parl. 107.

Thus, where there was a lease and release by *A.* to trustees and their heirs to the use of *A.* for 99 years, remainder to the use of trustees for 25 years, remainder to the heirs of the body of *A.* the court held this remainder was void, because there was no preceding estate of freehold limited to support it. — So where the husband and wife covenanted to levy a fine of the wife's lands to the use of the heirs of the body of the husband on the wife begotten, this limitation was void for want of a preceding freehold. For in this case, the husband did not take an estate for life by implication, because the estate was the wife's, and moved originally from her.

2 Salk. 679.
Adams v. Sa-
vage.

2 Salk. 675.
Carth. 262.
Show. Caf.
Parl. 455.

As for a contingent remainder for years, (if such estate be admitted), there can be no necessity

Raym. 131.

V d. 3 Leon.
43. In Cran-
mer's Case.

Raym. 140.

for a preceding freehold to support it. For the remainder not being freehold, there can be no occasion for the freehold to pass out of the grantor in order to give it effect. But in the case of *Corbett v. Stone*, in which there was a contingent estate for years, limited after an estate for years; the court inclined to an opinion, that a contingent estate for years could not be, because a lease for years operates by way of contract; and therefore the particular estate and the remainder estate operate as two distinct estates, grounded on different contracts, not forming together one estate, as a particular estate and remainder do. The case of *Corbett v. Stone*, was this. *A.* by indenture, leased to *B.* and *C.* for 40 years; if *A.* should so long live, in trust for *A.* to receive the profits during her life, and that after her decease, one moiety should be to *D.* and the other moiety to *E.* (no parties to the deed) their executors, administrators and assigns, severally and respectively, for the term of 1000 years. *A.* levied a fine and died, and five years passed after her death, and the plaintiff claimed under *C.* and entered: the court objected that the limitation to *D.* and *E.* could not pass as a present estate, as they were not parties to the deed, and if it were a remainder, it must be contingent, because limited after the death of *A.*, before which the preceding estate for 40 years might determine: but they seemed not to consider it as a contingent remainder, as they said there cannot be a contingent remainder for years, for the reasons above given.

Although every contingent freehold remainder, must be supported by a preceding freehold, yet it is not necessary that such preceding estate continue in the actual seisin of its rightful tenant;

it

it is sufficient if there subsists a right to such preceding estate, at the time the remainder should vest, provided such right be a right of entry, and not a right of *action* only : for whilst a right of entry remains there can be no doubt but the same estate continues ; since the right of entry can exist only in consequence of the existence of the estate ; but when the right of entry is gone, and nothing but a right of action remains, it then becomes a question in law whether the same estate continues or not ; for the action is nothing more than the means of deciding this question. Another estate is in the mean time acknowledged and protected by the law, till such question be solemnly determined in a court of justice, upon the action brought.

Thus, if *A.* be tenant for life with a contingent remainder over, and tenant for life be dis-^{12 Mod. 174.} seised, all the estates are divested ; but the right of entry of tenant for life will support the contingent remainders ; but in this case if the contingent remainder does not vest, before such a descent be cast as will take away the entry of tenant for life within the statute of *Hen. 8. c. 33.*, and drive him to his action, then is the contingent remainder gone ; because there no longer subsists any right of entry to support it, that right being turned into a right of action.—So where a gift in tail was to *A.* remainder to the right heirs of *B.*, *A.* made a feoffment in fee, and afterward *B.* died ; the right heir of *B.* was not intitled to the estate, because there was no particular estate either *in esse* or *in right* to support the remainder when it fell ; but (said Chief Justice *Charlton*) if tenant in tail be disseised and dieth, the same shall not take away the right of action only,^{1 Rep. 135.} For *A.* had no right against his own feoffment, nor had his issue right till his death, and then of

of the contingent remainder, for there the right of the particular estate remaineth in disseisee and supports the contingent remainder.

2 Roll's Abr.
796. pl. 11.
This was the
case of a set-
tlement by
Sir Edward
Coke.

Vide 2 Sid.
159.

So where *A.* covenanted to stand seised to the use of himself for life, remainder to his wife for life, remainder to his daughter for life, remainder to her first son in tail; and afterwards granted the reversion without consideration, reciting the former settlement, and after that made a feoffment; it was resolved that the grant did not hinder the arising of the contingent uses, because the grantee had notice, and therefore took it subject to the grantor's covenant to stand seised; and that the feoffment did not destroy the contingent estate, because the right of remainder for life in the daughter, upon which she might have entered for the forfeiture, did support it. But in this case it seems if the feoffment had been made before any grant of the reversion, the contingent use would have been destroyed, notwithstanding the right of entry in the daughter, the reason of which will be explained in a subsequent page.

1 Ventr. 189.
Lord Raym.
316.

Cro. Car. 102.
Bigot and
Smith.

This right of entry to support a contingent remainder must be a *present* right, a future one will not do; it must also precede the contingency, and be actually existing when that happens, for if it only commences at the same instant with it, the remainder will not vest. Hence if baron destroys the particular estate of himself and wife during the coverture, the future right of the wife to enter at his death is insufficient. As where baron made a feoffment to the use of himself and his wife, and the heirs of the survivor of them, and afterwards made another feoffment of the same lands; it was adjudged that the right of entry in the wife was not sufficient to support the contingent fee, and vest

vest it in her on the death of the baron. In this case we observe that the particular estate was not existing at the husband's death, when the fee should have vested, for his second feoffment had destroyed it during the coverture; and though the wife's right of entry took effect at the instant the remainder should have vested, yet it was insufficient, for it should have been then actually existing.

But wherever the estates are limited by way of use, and are afterwards divested and turned to a right; it is holden necessary to the execution of the subsequent contingent uses, that either the tenant of some preceding vested use, or else that the feoffees should enter in order to re-vest the estates; for although the contingent uses are not destroyed by such a divesting of the preceding estate as turns it to a right of entry, as they would be if such estate was determined or turned to a right of action only; yet there must be a seisin in the feoffees to the contingent use before it can be executed. As this matter apparently involves some degree of difficulty in it, I shall endeavour to explain what may be collected from the arguments and resolutions of the Judges in *Chudleigh's case*. It appears that the court in that case, resolved, that upon a conveyance to uses there is no actual seisin left in the feoffees; but as to all the uses *in esse*, and which vest immediately, the seisin is presently transferred unto the *cestui's-que* use, and as to the uses not *in esse*, there is no present seisin existing any where, but only a contingent seisin in the feoffees, *i. e.* the possibility of a seisin to those uses when they come *in esse*; which seisin (till then contingent only) will arise and exist in the feoffees in order to serve the contingent uses, when the contin-

Vide foregoing cases.

Rep. 120.

gency happens, if the estates limited in the conveyance to uses be not in the mean time divested and disturbed; but if the estates happen to be first divested or disturbed, then will that possibility of a seisin in the feoffees, which is to take effect on the contingency, be divested as well as the other estates, and must be reduced and revested before the contingent uses can be executed, *vid Cbudleigh's case*.—Now if this divesting or disturbance of the preceding uses, has operated so far, as not to leave a right of entry in any preceding vested estate, then is the contingent use entirely gone as we have shewn before; but if a right of entry is left, then may the tenant who has such right of entry, by making such entry, revest the estates which were divested, and amongst the rest the contingent seisin of the feoffees will be thereby revested: but if no such entry should be made by any such tenant, then must the feoffees enter themselves to revest their contingent seisin, otherwise there will exist no seisin to be executed and transferred by the statute to the contingent use. Hence if the feoffees should bar their own right of entry, upon such an occasion, by feoffment, release or otherwise, the contingent use can never be executed for want of a seisin to it, and the *cestui-que* use will have no other remedy than against the feoffees in a court of equity for breach of trust. As if a feoffment be made to the use of *A.*, for life, remainder to the use of *B.* for life, remainder to the use of the eldest son of *B.* in tail, &c. here the feoffment of *A.* will not destroy the contingent remainder to the son of *B.* because of the right of entry in *B.* upon the forfeiture of *A.* and if *B.* enters either in the lifetime of *A.* or after his death, this shall reduce the contingent

Of this vide
hereafter.

1 Roll's Abr.
797. pl. 12.

Ibid. pl. 13.

gent remainder ; so that if a son be born in his lifetime it shall be executed by the statute without any entry of the feoffees. But if after the feoffment of *A.*, *B.* dies without having entered, ^{1 Roll's Abr., 797. pl. 14.} though he should have a son born in his lifetime, that son cannot enter, the contingent seisin having been disturbed and not revested. But in this case the feoffees may enter, and thereby revive the contingent use, which by their entry will be executed in such son by the statute. But if after the death of *B.* without entry, the feoffees should by feoffment or otherwise bar their entry, ^{Ibid. pl. 15.} then can the contingent use never be executed for want of a seisin to it.

It is this necessity for a seisin to the uses as ^{2 Roll's Abr. 796. pl. 11.} they arise, that accounts for the observation before made, with respect to the case of *Sir Edward Coke*, cited about three pages before, viz. that if *Sir Edward* had made the feoffment before he had granted the reversion, the contingent use to the first son of his daughter, had been destroyed. It was resolved in *Cbudleigh's* case, that privity of estate is absolutely requisite to the standing seised to a use : that is, that a person must come in *of* or *under* the same estate, out of which the uses were originally limited ; otherwise he is not seised to those uses. Now in the case of *Sir Edward*, the contingent uses were to arise out of the estate of which he stood seised, i. e. out of the reversion after the death of his wife and daughter ; for the seisin of the particular uses *in esse* were executed to the uses by the statute of uses ; so that *Sir Edward* actually stood seised of nothing more than the reversion. Therefore, when *Sir Edward* granted the reversion without consideration, and reciting the uses, his grantee came in of the very same estate
out

out of which the contingent uses were to arise; that is the reversion which before was in Sir *Edward*, and consequently stood seised to the same uses as Sir *Edward* did before the grant; then the subsequent feoffment of Sir *Edward*, devested this reversion in the grantee, together with the estates of the wife and daughter; but as long as there was a right of entry in the daughter that was sufficient to support the contingent use to her first son, provided there could be a seisin to that use when it should arise; for though in conveyances at common law, a right of entry in some preceding estate, would alone have preserved a contingent estate, yet when the limitation was by way of use, it was also requisite that there should be a seisin to that use, as we have already seen: and when the wife entered after the death of Sir *Edward*, she thereby reinstated all the devested estates, and amongst the rest the reversion of Sir *Edward's* grantee: and such grantee's seisin to the future use was thereby restored. Thus we see the right of entry in the daughter supported the contingent use to her son, provided there could be a seisin to it when it should arise; and the entry of the wife revested and restored the seisin to it. But if Sir *Edward* had made a feoffment in the first instance, though without consideration and with notice; in that case the feoffee coming in of a different estate than that out of which the uses were to arise, that is to say, coming in of the immediate fee-simple in possession, and not merely of Sir *Edward Coke's* reversion, could not stand seised to the uses, which were to arise out of that reversion, for want of the privity before-mentioned: therefore, though in this case

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the right of entry of the daughter would have supported the contingent use to her son, if there could have been a seisin to it; yet as there could be no seisin to it such contingent use must necessarily fail; for the feoffee we see could not be seised to it, and no entry of the wife or any one else could restore the seisin of Sir *Edward* or his heirs, contrary to his own feoffment.

But this necessity for an entry, in order to revest and restore contingent estates, only holds in estates limited to uses, and exists by virtue of the statute of uses which requires a seisin existing, in order to be executed and transferred to the use. For in estates at common law, the mere right of entry without any actual entry made, supports the contingent remainder: as if in *Archer's* case, *Robert* had been disseised and died, yet the remainder would have been good, because the particular estate remained in right, and might have been revived. So, if a gift in tail be made to *A.* remainder to the right heirs of *B.*, if tenant in tail be disseised and die, the remainder is not destroyed, for the right of the particular estate supports it.

¹ Rep. 67. a.

¹ Rep. 135. b.

It is necessary that the estate supporting, and the remainder supported, should both be created by one and the same deed or instrument; therefore an estate for life settled by *A.* on *B.* by deed, will not enure to support a contingent remainder given by the will of *A.* As where *A.* being tenant for life by marriage-settlement, remainder to his first and other sons by that marriage in tail-male; the reversioner reciting the settlement, and devising in the first place, according to the limitation of it, then if *A.* die without issue of that marriage, he devised

⁴ Mod. 316.
Eq. Abr. 182.
¹ Lord Raym.
37. Skinner
558. Moor v.
Parker.

to

to the first and other sons of *A.* by a second wife, and if *A.* should *die without issue*, then he devised the land over in fee. It was contended that *A.* under this devise took an estate-tail by implication; and of course the remainder over in fee was well supported. But the court held it was impossible to make this an estate-tail in *B.*, for nothing was given him by the devise, but he had only the estate which he had by the first settlement. That here being two several conveyances the devise could not be tacked to the estate for life which was limited by another conveyance. And *Holt* Chief Justice questioned whether the immediate devise to the issue, not being *in esse* was good. If not then the remainder over in fee could not take effect as a contingent remainder, for want of a particular estate to support it. — But where *A.* made a feoffment to the use of himself for life, and after the death of *A.* and *M.* his wife, to the use of *B.* (eldest son of *A.*) for his life; this was a contingent remainder in *B.* But though it did not appear in the case, yet it afterwards appearing upon examination, that by a former deed *M.* had an estate for life; Lord Chief Justice *Hale* said the use should not be contingent; but the mentioning that the commencement thereof should be after the death of *M.* was only expressing when *B.* should take the profits in possession; and did not make a contingency.

Vide also *Cafe*
Temp. Talb.
252. *Lady*
Lanesborough
v. Fox, and
2 Burrow
873. *Good-*
man v. Good-
right.

Pollexf. 66.
in the case of
Weale and
Lower.

It seems, that in cases where estates are devised in trust, there is no necessity for particular trustees to support contingent limitations, the legal freehold in the general trustees will be sufficient for the purpose; and consequently in such cases, it is not necessary that a
con-

contingent remainder should vest by the time the preceding trust limitation expires. As where the testator devised his estate, real and personal, to trustees and their *heirs, executors and assigns* upon trust, to pay an annuity to his son *B.* and after *B.*'s death, he devised one moiety thereof to such children as *B.* should leave and their heirs, and the other moiety to the future children of his grandson *C.* &c. the testator died, afterwards *B.* had children and died, and afterwards *C.* had issue; it was contended that the legal estate in the trustees was determined at *B.*'s death, and therefore the limitation to *C.*'s children, being a *contingent remainder*, because limited *per verba de presenti*, and not vesting upon the death of *B.* (because *C.* had then no children born), could never vest at all; but it was held, that notwithstanding the limitation was *per verba de presenti*, as *C.* was very young at that time, the testator must have intended a future devise; and therefore it might well take place as an executory devise; but if it were taken as a *contingent remainder*, as some of the trusts mentioned in the will, would not admit the estate in the trustees to be confined to the period of *B.*'s life; the estate continuing in them would support the limitation to *C.*'s children, though it could not vest at *B.*'s death; and therefore whether it were taken as a future limitation or a *contingent remainder*, it would be good either way. So where *A.* devised to the use of trustees, and their heirs in trust for *B.* for life, remainder to his first and other sons successively in tail, remainder to the future sons of *C.* successively for life, remainder over; *B.* died without issue in the testator's lifetime, the contingent limitations were taken as executory devises, because no

Cas. Temp.
Talb. 125.
Chapman v.
Blisset.

That trustees
have a fee
without words
of limitation
where the
purposes of
the trusts re-
quire it, vide
1 Vezey 491.
3 Burrow
1684.

Cas. Temp.
Talb. 44.
Hopkins v.
Hopkins.

1 Vezey 268
Hopkins v.
Hopkins.
1 Atk. 581.

child was then born to C.: afterwards a child was born to C. and died, and a subsequent remainderman claimed the estate, upon a supposition that all the preceding intermediate limitations which could not vest at the death of such child were destroyed; as it had been decreed that upon the vesting of the executory devise in that child, the subsequent limitations became *contingent remainders* upon that executory devise; but it was held that the inheritance in the trustees was sufficient to support the intermediate *contingent remainders* till they should come *in esse*, although no particular trustees to support, &c. were inserted; and that the estate should not vest in possession, whilst an object of any preceding limitation might come *in esse*.

Yelv. 9. 10.

If rent be granted to A. for the life of another, the remainder over, though the grantee dies, so that the remainder determines in interest as to the perception of the profits; yet in as much as the *terre-tenant* during this time, holds the land discharged, it is sufficient to support the remainder, *Per Popham*, and agreed by the whole court, in the case of *Salter v. Butler*. — But *quere* whether this holding of the land discharged, would have supported a contingent remainder? Though it seems indeed, that in these cases of rents *pur auter vie*, upon the death of the grantee before the *cestui que vie*, (though strictly there is no occupancy of rent,) the *terre-tenant* by holding the land discharged, might be considered in the nature of an *occupant* of the rent; and therefore in that view, the particular estate might be understood to have a continuance, sufficient even to support a contingent remainder. But at this day, it seems there can be no room for a question of that nature; for since the statutes of 29 Car. 2. c. 3. and 14 Geo.

2. c. 20. the rent is holden to continue in the representatives of grantee dying in the lifetime of *cestui que vie*.

Vide 3 P. W.
264. in the
note
Barnardist.
Rep. in Chanc.
46. Kendal
& Michfield.

Of the Time when a Contingent Remainder should vest.

WE are now to consider the time at which it is requisite a contingent estate should vest in interest; that is, at what period, with respect to the duration of the preceding estate, the contingency upon which such remainder is limited to take effect, ought to happen.

It is not only necessary that a vested freehold estate should precede a freehold contingent remainder, as we have already seen; but some preceding freehold estate must subsist and endure until the time when the contingent remainder vests, that is, until the contingency comes to pass; for it is a general rule, that every remainder must vest either during the particular

1 Rep. 66.
135.

estate, or else at the very instant of its determination. So that if a lease be made to *A.* for life, and after the death of *A.* and one day after, the land shall remain to *B.* for life, this remainder to *B.* is void, because it cannot take effect immediately upon the determination of the preceding estate. This rule was originally founded on feudal principles, and was intended to avoid the inconveniencies which might arise by admitting an interval, when there should be no tenant of the freehold, to do the services to the Lord, or answer to *Strangers præcipes*, as well as to pre-

Plowd. 25.

serve

serve an uninterrupted connection between the particular estate and the remainder, which in the consideration of law, are but several parts of one whole estate.

There are two or three instances of vested remainders, which seem to be in some measure, exceptions to this rule. As where lessor deviseth *A.* his lessee for life, and makes a lease to *B.* for the life of *A.*, the remainder to *C.* in fee; here though *A.* enter and defeat the estate for life, the remainder to *C.* is good: for having been once *vested* by a good title, it would be unreasonable that the lessor should have it against his own livery. So if a lease be made to an infant for life, if the infant at his full age disagree to the estate for life, yet the remainder is good, having once been *vested* by good title. So if a rent be granted to the tenant of the land for life, the remainder in fee, this is a good remainder in fee, though the particular estate continue not: for *eo instanti* that he took the particular estate, *eo instanti* the remainder *vested*, and the suspension in judgment of law, grew after the taking the estate. So if a lease be made to *A.* for the life of *B.*, the remainder to *C.* in fee; *A.* dieth, now (at common law) before the entry of an occupant, there was no particular estate, and yet the remainder continued good. But now since the statutes 29 *Car.* 2. c. 3. & 14 *Geo.* 2. c. 20. no such vacancy of the particular estate can happen.

It follows from the rule I have just mentioned, that where the event on which a contingent remainder is limited to take effect, does not come to pass by the time at which the preceding estate determines, it never can arise or take effect at all. Thus, where *A.* was tenant for life, remainder

mainder to his eldest son in tail, who died, leaving his wife *enfeint* with a son, who was afterwards born; the question was, Whether this son was intitled to the remainder under the limitation? and it was adjudged in the Common Pleas, and that judgment affirmed in the King's Bench, that such posthumous son could not take, because he was not born when the particular estate determined. The judgment, it is true, was afterwards reversed in the House of Lords; but it was against the opinion of all the judges, who were much dissatisfied with the reversal; and indeed an act of parliament was thought necessary to take such cases as that out of the old law; by which it was enacted, that *where any estate is settled in remainder to children, with remainder over, any posthumous child may take in the same manner as if born in the father's lifetime.*

1 Salk. 227
Reeve v.
Long.

Stat. 10 & 11.
W. III. c. 16.

So if a lease for life be made with remainder to the right heirs of *J. S.* this remainder will never vest if tenant for life die before *J. S.*; for in that case the particular estate determines before the contingency comes to pass on which the remainder is limited to take effect, *i. e.* the death of *J. S.*; for *nemo est hæres viventis.*

Inst. 378. a.

So where *A.* seised of lands in fee, makes a lease for years to *B.* remainder in tail to *C.* remainder to the right heirs of *B.* in this case *B.* has nothing in the fee, but it is a contingent remainder to his heir (for *B.* did not take the freehold). If *C.* dies without issue in the lifetime of *B.*, the remainder becomes void: for the foundation and support of this contingent remainder fails, because it ought to have a freehold to support it, when the remainder falls out; but if *C.* die without issue, living *B.* the freehold is expired

Jenk 248. pl.
38. 2 Roll.
Abr. 418.
1. Pl. 4.

pired before *B.* can have an heir, and therefore the remainder will never take effect.

But although no interval is admitted between the determination of the particular estate and the vesting of the remainder; yet a remainder may be so limited, as not to vest until the very instant in which the particular estate determines.

As if an estate be limited to *B.* during the life of *A.* remainder to the heirs of the body of *A.* this is good, though such remainder cannot vest till the very instant in which the particular estate determines. So if land be given to *A.* and *B.*

during their joint lives, remainder to the right heirs of him who shall die first, this remainder will be good, though it cannot vest before the determination of the particular estate; and it is observable, that the heir of that one of them who dies first, shall have the land by descent, in conformity to the rule before treated of, where the ancestor takes a freehold with a subsequent limitation to his heirs in the same conveyance.

Upon the principle here laid down, that a contingent remainder must vest by the time the preceding estate determines; it follows, that an estate limited on a contingency may fail as to one part, and take effect as to another, wherever the preceding estate is in divers in severalty; for the particular tenant of one part may die before the contingency, and the particular tenant of another part may survive it. As in the case

of *Lane* and *Pannel*, which as to the present point was in effect as follows: Feme covert and a stranger, being joint tenants for life of copyhold lands, with remainder to the heirs of the body of baron and feme; the stranger surrendered his moiety to the baron and feme, and afterwards the baron surrendered the whole to *B.* in

fee

fee, the feme died, leaving issue, and afterwards the baron died; the question was, Whether the remainder to the heirs of the body of the baron and feme vested in the issue? and it was adjudged, that when the stranger conveyed his moiety to the baron, the jointure between the stranger and feme covert was severed; and when the baron afterwards conveyed the whole to B. took an estate in one moiety for the life of the feme (defeasible by her on the death of her husband) and in the other moiety for the life of the stranger; therefore upon the death of the feme the estate in the first moiety was determined, at which time the remainder, as to that moiety, ought to have vested, which it could not do, because the person to take it was to be heir of the bodies of both baron and feme; but that was impossible during the life of the baron (for *nemo est heres viventis*); and therefore, as the remainder could not vest at the determination of the preceding estate, it should never vest at all as to that moiety. In this case it appears that the remainder failed as to one moiety only.

So likewise a contingent remainder may vest in some, and not in all the persons to whom it was limited; accordingly, as some may come *in esse* before the determination of the preceding estate, and others not. As if a limitation be to A. for life, remainder to the use of the right heirs of J. and of K.; here if J. happen to die before A., and K. to survive A., the heirs of the first may take, but those of the latter will be forever excluded.

But where a contingent remainder is limited to the use of several, who do not at all become capable at the same time; notwithstanding

N. B. Here we are to observe the surrender to B. in fee did not destroy the contingent remainder, for the legal freehold being in the Lord, the surrender of the Baron passed no more than he lawfully might pass. *Vide infra*, p. 103.

it vests in the person first becoming capable, yet shall it devest as to the proportions of the persons afterwards becoming capable before the determination of the preceding estate, and vest in them respectively. As where a conveyance was to the use of *A.* the husband for life, remainder to *B.* the wife for life, remainder to all the issues-female of their two bodies, and the heirs-male of the bodies of such issues-female; *A.* and *B.* had issue a daughter; and it was resolved, that the remainder in tail to the issues-female was not so attached in that daughter, as not to be devested for a moiety by an after-born daughter; for such a limitation, being by way of use, springs out of the estate according to the capacity of the person in whom it is to rest.

Comb 467.
Matthews v.
Temple.

Ibid.

Bac. law
tracts, 351.

For this vide
2 Salk. 577.
2 Lev. 39.
3 Keb. 87.
Cole v. Le-
vingstone.
1 Ld. Raym.
314.

So if there be a limitation to *A.* for life, remainder to the use of the right heirs of *B.* and *C.*; though *B.* should die before *C.* yet the heirs of *C.* shall take, if he die before *A.*; and the heirs of *B.* and of *C.* will be joint-tenants of the freehold and tenants in common of the inheritance. So it is if a future use be limited to two, where one becomes capable before the other. As if I make a feoffment to the use of my wife that shall be, and my first begotten son for their lives, and I afterwards marry, my wife will take the whole use; and if I afterwards have a son, he will then take jointly with my wife.

Lastly, I shall here observe, that if there be no particular estate *in esse*, nor any present right of entry, when the contingency happens, altho' the particular estate be afterwards replaced and restored, yet will the remainder never arise.

How Contingent Remainders are destroyed or prevented ta- king effect.

IT has been already shewn, that a remainder must vest either during the existence of the particular estate, (*in esse* or in *right of entry*), or at the very instant of its determination, otherwise it will never take effect at all. Consequently, every such determination of the preceding estate before the contingency happens, as leaves no right of entry, must effectually destroy a contingent remainder. I shall first instance some cases wherein the determination of the preceding estate ariseth by the feoffment, forfeiture, surrender, or other act of the particular tenant, and afterwards consider those cases wherein the preceding estate is merged by descent of the inheritance on the particular tenant; for where the inheritance comes by descent on the particular estate, we shall find some exceptions to the generality of the preceding conclusion.

Where lands were devised to *A.* for life, and after to the next heir-male of *A.* and the heirs-male of the body of such heir-male; *A.* having issue a son, made a feoffment to *B.* upon whom the son entered, and it was adjudged that this was a contingent remainder to the son of *A.* (because the word *heir* was in the singular number distinguished by the word *next*, and followed by words of limitation grafted upon it,) and therefore was destroyed by the feoffment of *A.* who was but tenant for life; for that every remainder must vest either during the particular estate,

1 Rep. 66.
Archer's case.

2 Lev. 39.
Puresfoy v.
Rogers.

2 Salk. 427.
576. 618
Thompson v.
Leach.
2 Vent. 198.

Jenk. Cent.
248. pl. 38.

or *eo instanti* that the particular estate determines: in this case the particular estate was determined by the feoffment of *A.*, and, since the remainder could not then vest, for *nemo est heres viventis*, it could never afterwards arise. So where feme covert was tenant for life, with remainder to her first and other sons in tail-male successively, and before the birth of any son, the reversion in fee was conveyed to the husband and wife by fine; a son was afterwards born, the feme died; and the court held, that although, if the feme had survived her husband, she might have waived and avoided the estate taken by the fine; yet the contingent remainder to the son was utterly destroyed, he not being *in esse* when the particular estate determined; and that the possibility which the wife had of rejecting the inheritance given by the fine, and thereby reviving the particular estate for life, would not preserve it. So where there was tenant for life, with remainder to his first and other sons, remainder to *B.* in tail; tenant for life, before the birth of any son, surrendered to *B.*, a son was afterwards born, and the court held, that the surrender, if good, would have barred the contingent remainder; but the surrender was adjudged void, because it afterwards appeared, that the surrenderor was *non compos* at the time of the surrender.—Jenkins I observe states a case, and says if *A.* make a lease for life to *B.* remainder to the right heirs of *J. D.*, if *B.*, in the lifetime of *J. D.* surrenders to *A.*, yet the lease supports the contingent remainder. He refers to the pleadings in *Archers* case, 1 Rep. 63. and to 1 Rep. 113. for this point: but there is nothing to be found in either of those places respecting it: it is said indeed, 1 Rep. 130-1, that if a lease be made

made for life, remainder to the right heirs of *J. S.* if lessee for life, maketh a feoffment or dieth during the life of *J. S.*, the remainder to the right heirs of *J. S.* is destroyed: but this so far from supporting, makes directly against the point, so far as it goes. And indeed from the case which *Jenkins* puts immediately afterward, there is reason to think that something has been omitted in his state of the case I have cited; but be that as it may, the resolution in the foregoing case of *Thomson v. Leach*, clearly proves the case cited from *Jenkins*, not to be law.

It is held that the surrender of a copyhold ^{2 Roll. Abr. 794. Pl. 6.} will not destroy a contingent remainder; as where *A.* seised of a copyhold in fee, surrendered it to the use of his will, and afterwards devised it to *B.* for life, the remainder to *his heirs of his body* begotten. *B.* was admitted, and surrendered it to the Lord of the manor, to the use of the Lord *to do his will* with it. *B.* died; the question was, Whether admitting the limitation to the heirs, &c. to operate as a remainder, such remainder was destroyed by the surrender of *B.*? it was adjudged that the remainder was not destroyed, because the legal freehold was in the Lord during the life of *B.*; so that even a vested remainder-man could not have entered during *B.*'s life; but it was afterwards adjudged that the limitation gave a fee-simple conditional to *B.* (for being copyhold it could not be an intail, because copyholds are not within the *statute de donis*;) and therefore the former judgment was reversed on this new point. It appears therefore that in copyholds, the surrender of tenant for life will not destroy a contingent remainder limited after the life-estate, as in the case of estates at common law; because the legal freehold being in the Lord will support the remainder.

And vide *supra*, p. 99.

Style 249, 273. *Pauley v. Lowdall*. Hence we see the words *heirs of the body* are words of limitation, even in copyholds, when the ancestor takes the customary freehold.

2 Vern. 243.
Mildmay v.
Hungerford.
But if the
estate for life
expires before
the contin-
gency hap-
pens, the re-
mainder is
gone. Vide
supra p. 99.

2 Freem. 213.
Penhay v.
Hurrel.

And vide
3 Atk. 729.

mainder. — So, where *A.* was a copyholder for life, with remainder to his first, second, &c. sons in tail, remainder to *B.* in fee. *A.* before a son born got a conveyance from the Lord of the manor, of the reversion in fee of the copyhold, as thinking that would merge his estate and destroy the contingent remainder; but it was admitted, that the contingent remainder was not destroyed because the legal freehold was in the Lord.

So likewise it appears, that *cestuique trust* for life cannot by feoffment or other conveyance commit a forfeiture, or destroy a contingent remainder. For though when the trust of an estate is limited to a man and the heirs of his body, with remainder over, if such tenant in tail of a trust suffer a recovery the remainders will be barred; yet where tenant for life of a trust conveys in fee by feoffment or any other conveyance, it is no forfeiture of his estate, neither will it destroy a contingent remainder depending on it; because whatever conveyance he makes, as he has not the legal estate in him, it passes only what he can lawfully grant (*i. e.* his trust-estate for life,) and a right of entry resides in the trustees in whom the legal estate is vested. But the reason why a recovery suffered by tenant in tail of a trust, will bar the remainders, is because he is master of the estate, and may call in the legal estate when he pleaseth, and have it conveyed to the trust. But the court of *Chancery* will never execute the estate in law to tenant for life of a trust, to enable him to destroy the contingent remainders.

The

The same rule as to the destruction of contingent remainders holds whether the remainder be limited at common law or by way of use. ^{1 Rep. 120.}
 As where *A.* having issue *B.* and *C.* his sons, ^{Chudleigh's case.} made a feoffment to the use of feoffees and their heirs during the life of *B.* remainder to the use of the first and other sons of *B.* successively in tail, remainder to the use of *C.* in tail-male, remainder to others in tail, remainder to his own right heirs; *A.* died, the feoffees enfeoffed *B.* in fee without consideration, and with notice of the said uses; afterwards *B.* had a son, and the question was, Whether the contingent remainder to him was barred by the feoffment? and it was adjudged, upon solemn argument in the *Exchequer* Chamber, that there being no son of *B.* to take when the particular estate determined by the feoffment, (which was a forfeiture), the son could never after take; for that a remainder in use ought to vest during the particular estate, or at least *eo instanti* it determines, as well as a remainder at common law. ^{Cro Jac. 168.} So if one make a ^{Bell's case} feoffment in fee, or covenant to stand seised to the use of himself for life, and afterwards to the use of his first son in tail-male, and before the birth of any son, make a feoffment in fee, such feoffment will destroy the contingent remainder to the son. ^{cited.}

The reason why the feoffment in *Chudleigh's* case, though without consideration and with notice, destroyed the contingent remainder, was, because at common law, privity of estate as well as want of notice was requisite to the standing seised to a use: that is, it was necessary that the person standing seised to a use, should have come in, of or at least under the same estate out of which the use was limited to arise. Now in *Chudleigh's* case the feoffees were seised only of an

an estate for the life of the first son, whereas their feoffee, by force of the feoffment came in of a greater estate; *viz.* the fee-simple; which was neither the same estate nor yet an estate carved out of it; consequently there wanted that privity which at common law was requisite to subject him to the original uses: and of course there could exist no seisin to the contingent use when it should arise, which, as I have observed in a former page, was absolutely requisite to its execution; therefore such contingent use must necessarily fail. It is true that before the statute of uses, if the feoffees had made a feoffment without notice, their feoffee would have stood seised to the old uses; but that was, because the feoffees themselves before that statute, stood seised of the legal fee-simple, and of course their feoffee came in, either of the same estate, or of an estate carved out of that. But since the statute it is otherwise, for now the feoffees are seised of no greater estate than what is actually limited *in use* to them, the seisin being executed to the rest of the uses by the statute: from whence it follows, that when such feoffees convey the fee, their feoffee, &c. comes in neither *of* nor *under* the estate which they were seised of.

This is the state of matters considered in a strict legal view; but we are to observe, that the interposition of a court of equity will make a material difference in such cases; for it seems that if as this day feoffees to support contingent remainders, whether under a settlement made for valuable consideration or voluntary, or by will, convey or join in a conveyance to destroy the contingent uses or remainders; the court of *Chancery* will consider it as a breach of trust.

trust. And if the purchaser under such conveyance comes in for valuable consideration, and without notice; then will the remedy be against the trustees, who shall be decreed to purchase lands with their own money, equal in value to the lands sold by them, and to hold them upon the same trusts and limitations, as they held the other. But if the conveyance be with notice of the uses, whether with or without consideration, in that case the purchaser shall hold the lands subject to the former trusts; thus we observe the court of *Chancery* for the protection of trusts, considers a purchaser from trustees without notice, as coming in privy of the same estate which the trustees themselves held; and then pursuant to the doctrine of uses when in their fiduciary state, such purchaser holds the lands subject to the same trusts, as the trustees themselves did.

Thus where *A.* devised lands to trustees and their heirs, to the use of his sister *D.* for her life, remainder to the same trustees and their heirs during the life of *D.* in trust to preserve contingent remainders, remainder to the use of the first and other sons of *D.* successively in tail-male, remainder to *E.* in fee: after testator's death *B.* married *D.*, afterward *B.* and *D.* his wife, together with *E.* the remainder-man in fee, joined in a feoffment to (new) trustees, to the use of *B.* and his heirs: and a fine was afterward levied to the same uses; shortly after, and before the birth of a son to *D.*, the trustees under the will, by lease and release conveyed the lands to *B.* in fee: and upon a bill brought by the son of *D.* to have the benefit of the will of his uncle *A.* it was resolved, 1st, That the feoffment and fine by *B.* and *D.* his wife did not

Manfel v.

Manfel, 2 P.

610. Cal.

Temp. Talb.

252.

Vide also
1 P. W. 128.
Pye v. Gorge.

not destroy the contingent remainder, because the freehold in the trustees under the will supported it. 2dly, That the lease and release by the trustees before the birth of any son to *D.* did at law destroy the contingent remainder. But as this conveyance was with notice (being to the tenant for life himself) it was held that the lands should continue liable to the same trusts as they were when the trustees joined in the conveyance, and all parties were decreed to join in making such an estate to the plaintiff as he would have been intitled to under the will of *A.* if the contingent remainder had not been destroyed; that was, an estate-tail. — But the court held clearly in the same case, that where there is a mere tenant for life, who is no trustee, with contingent remainders to his first and other sons, &c. depending on his estate; there if he destroy the contingent remainders at law; though it be a plain wrong, notwithstanding his legal power of doing so; yet, as he is no trustee, it is no breach of trust, and therefore equity will not interfere; for in such case *aequitas sequitur legem.*

1 P. W. 359.
Sir Thomas
Tippen's case.
1 Eq. Abr.
385. pl. 2.
Tipping v.
Piggott.

1 P. W. 387.
Elfe v. Os-
burn.

There are indeed cases, wherein the concurrence of the trustees in a conveyance to destroy contingent remainders, has been connived at by the court of *Chancery*; as where upon a subsequent remainder to the right heirs, a collateral heir only has been affected by it, there having been no issue of the marriage; for next after the parties to the marriage; the court considered the issue to be the only objects of the settlement and trusts, and paid little regard to the remainder over to the right heirs, as objects of no consideration in the settlement. As also where the application to the court for relief has been made

made, by one who was not at the time, nor probably ever might be intitled to the remainder, under the words of the limitation. There are likewise other cases where the court has actually decreed trustees to join in a conveyance to destroy contingent remainders; as where the settlement was voluntary, and the conveyance was at the suit and for the benefit of creditors. As also, where the first son to whom the remainder in tail was limited, had attained his age, and the concurrence of the trustees was necessary to enable him to make a settlement on his marriage: and indeed wherever a remainder in tail is vested, the court inclines to pay little regard to any subsequent remainder. But however, it is the safest way for trustees to observe the words of Ld. Chancellor in the case of *Sir Thomas Tippen or Tipping v. Pigott*, "That it would be a dangerous experiment for trustees in any case to destroy remainders which they were appointed by the settlement to preserve."

1 P. W. 358.
Basset v. Clapham.

1 P. W. 536.
Winnington v. Foley.

It is generally held, that any alteration in the nature of the preceding estate before a remainder vests, will destroy that remainder. As if lands be given to *A.* in tail, and if *J. S.* come to *Westminster* hall such a day, remainder to *J. S.* in fee, (it has been held) that if the lands descend to two coparceners who make partition, the fee shall not accrue to *J. S.* though he should come to *Westminster* hall at the day. And it has also been held, that if lands be given to *A.* and *B.* for the life of *C.* remainder to the right heirs of the survivor of *A.* and *B.*, and *A.* release to *B.* the remainder is destroyed. But notwithstanding these authorities, I conceive, that the alteration in the particular estate, which

4 Leon. 237.
pl 363.

Ibid.

1 Roll. Rep.
238, 317,
438.

N. B. This
was the case
of a surrender
of a copyhold,
but no dis-
tinction at all
was taken on
that ground.

Raym. 413.
Harrison v.
Belfey.
8 Rep. 76. b.

which will destroy a contingent remainder, must amount to an alteration in its *quantity*, and not merely in its *quality*. This opinion, I think, is warranted by two adjudged cases. The first is that of *Lane* and *Pannel* before cited, where it appears, that the severance of the jointure between two joint-tenants for life did not destroy the contingent remainder, limited after their joint estate; for there it is adjudged, that because the remainder could not vest at the death of one of them (after the severance of the jointure), such remainder was gone as to one moiety of the lands: now this judgment was nugatory and mistaken, if the severance itself destroyed the remainder as to the whole. In the other case it was adjudged, that the release of one joint-tenant to the other did not destroy the contingent remainder depending on their joint estate. It is true, that if a lease be made to two with a condition to have fee, if they make a partition of the term, the condition is destroyed; but that turns upon a reason which does not at all affect a contingent remainder, *viz.* the requisite agreement in *quality* between the first estate and the enlargement to accrue thereupon: the enlargement must accrue in the same quality in which the estate was first granted; for that was the quality of the estate conditioned to be enlarged, and it must not differ in quality at the time of enlargement from the estate enlarged; otherwise, instead of being an enlargement or extension of the estate then in being, it would only be the accession of another estate of different quality, which would not be agreeable to the terms of the condition. But no such necessary connection exists, or can be supposed to exist, between a remainder and the

the quality of the preceding estate. Whilst the particular estate continues the same in *quantity*, it continues to be the same estate as far as respects its relation to a remainder. If a release or severance between joint-tenants determine the old estate, then a vested remainder-man would be intitled to enter immediately upon such release or severance; but if, notwithstanding such release or severance, it continues to be the same particular estate as to a vested remainder, why does it not as to a contingent one? No legal modification or alteration in the circumstances only, of a particular estate, can be said to determine that estate; but the determination of the particular estate is the only point of connection between such estate and the remainder; therefore, until that point is passed, there still remains the same place for a contingent remainder to take effect.

It is said by Lord Chief Justice *Hale*, in the ² *Saund.* case of *Puresfoy* and *Rogers*, that in all cases where ^{386.}

the particular estate is merged in the reversion, there the contingent remainder is gone, though there be no divesting of any estate. As if there ^{Ibid.} be tenant for life, remainder in tail in *contingency*, remainder in tail *in esse*, if the tenant for life, and he in remainder in tail *in esse*, levy a fine, this is no discontinuance nor divesting of any estate, because each gives such estate as he has, and yet the mean contingent remainder is destroyed.

Exceptions, however, to the universality of this rule are admitted. Wherever the particular estate and reversion meet by the act of the parties only, I believe the contingent remainder is always destroyed, as in the case of *Puresfoy* and *Rogers* before cited, where feme covert was te- ² *Lev. 39.*
nant

1 Lev. 111.

9 Mod. 147.

nant for life, with remainder to her first and other sons in tail-male successively, and before the birth of any son, the reversion in fee was conveyed to the husband and wife by fine; a son was afterwards born, the feme died, and the court adjudged, that the contingent remainder to the son was destroyed by the merger of the wife's estate in the reversion. But our books apparently differ with respect to the destruction of the contingent remainder in cases where the inheritance becomes united to the particular estate by descent. Thus in the case of *Plunkett* and *Holmes*, it was resolved, that the descent of the fee on tenant for life did not destroy the contingent remainder. The case was this; one devised lands to T. his eldest son, for life, and if T. should die without issue *living at his death*, then to L. another of the testator's sons in fee; but if T. should have issue living at his death, then to the right heirs of T. for ever; the testator died, and it was resolved, that T. was tenant for life, (because the limitation over, was not upon a dying without issue generally, but was confined to a dying without issue *then living*,) with the remainder in fee in contingency; and that the descent of the fee upon him, as heir at the death of his father, did not destroy the contingent remainder. So in the case of *Boothby* and *Vernon*, it was taken for granted, that the contingency was not destroyed by the descent of the fee; A. devised lands to his sister, who was his heir at law, and her assigns for her life, and if she should marry, and have issue-male of her body living at the time of her death, then to such issue-male, and his heirs-male for ever; but if she should leave no issue-male at her death, then to G. and his heirs for ever. The

question



question respected the title of the testator's sister's husband, to be tenant by the courtesy of the lands so devised to her; and the court held, that the inheritance was never executed in possession in the sister during her life, (notwithstanding the inheritance descended on her), and therefore her husband could not be tenant by the courtesy; it follows, that the descent of the fee did not merge her estate for life, or destroy the contingency. The same point appears in *Archer's* case, where, notwithstanding the reversion in fee must have descended on *Robert* upon the death of his father, yet he was adjudged to be but tenant for life, with contingent remainder to his next heir-male. Rep. 66.

On the other hand, in the case of *Wood and Ingersole*, it is said to have been resolved, that the descent of the fee on tenant for life destroyed the contingent remainder; three distinct parcels of land were severally devised by the testator to his three sons, and that if either of them should die, the other surviving should be his heir; the eldest son died; and the reporter says, it was adjudged, that the fee descending on the eldest son at the father's death, had merged the freehold devised to him, and destroyed the contingent remainder. But there appears to have been a notable mistake in this report, as well as to the state of the case, as to the judgment; for the words on the roll are, *and if any of my sons die, the one to be the other's heir*; which words were adjudged void for uncertainty, and consequently the above point did not come into question. Cro. Jac. 260. Bullstr. 61. in the same case. T. Jones, 79. Pollex. 481. in the case of *Fortescue v. Abbot*.

But in the case of *Kent and Harpool*, which as to the point in question, was this: *A. the father* T. Jones, 76. 1 Vent. 306.

Rep. Temp.
Hardw. 13.

father being tenant for life, remainder to his son *B.* for life, remainder to the first son of *B.* remainder to the heirs of the body of *A.*; *A.* died before any son was born to *B.*; the court held the contingent remainder to the first son of *B.* was destroyed by the descent of the estate-tail on *B.* Of the same opinion was Lord *Hardwicke*, in the case of *Hooker and Hooker*, where lands were conveyed to the use of *A.* and his wife for life, remainder to the use of *B.* the son of *A.* for his life, remainder to the first and other sons of *B.* in tail, remainder to his daughters in tail, remainder to *A.* in fee; *A.* and his wife died in the lifetime of *B.* who afterwards died without issue, leaving a wife; the question was, Whether the wife of *B.* was intitled to dower in the lands? and it was decreed she was; and Lord Chancellor, with one of the Judges, was of opinion, that the estate for life in *B.* was merged by the descent of the inheritance upon him, and the contingent remainder destroyed.

The seeming differences, which are observable in the opinions of the courts in the above cases, may (as I apprehend) be very easily reconciled; by taking a distinction between those cases wherein a particular estate with a contingent remainder over, is devised, and the inheritance upon the devisor's death, descends *immediately* from him, upon the particular estate; and those cases where either the descent of the inheritance on the particular estate, is not *immediately* from the devisor himself, or where the limitations are not created by devise, or the descent of the inheritance, is otherwise clear of the above circumstances. *Plunkett and Holmes*, *Boothby and Vernon*, and *Archer's* case, are cases of the first sort. I do not recollect an instance of the second kind

kind in our books: but if in the case of *Boothby* and *Vernon*, we suppose the devisor to have left a son at his death, and that afterwards that son had died without issue, in the lifetime of the sister, to whom the particular estate was devised; in that case, the inheritance would first have descended from the devisor to his son, and from him to the sister, and consequently the descent of it on the particular estate of the sister, would not have been *immediate* from the devisor; and in such case, I apprehend the descent would have merged her particular estate, and the inheritance would thereby have been executed in her in possession, and consequently that the contingent remainder would have been destroyed, for the reasons hereafter given. The third sort is instanced in the cases of *Kent* and *Harpool*, and *Hooker* and *Hooker*.

The reasons upon which I ground the above distinction are these: Wherever a testator limits a contingent remainder, it is agreed, that the inheritance descends to the heir only till the contingency happens; if so, nothing can be more absurd than to make such descent destroy the contingency. The will does not operate till the testator's death; the descent takes effect at the same time; so that, under such a construction, the particular estate given to the heir by the will arises and is destroyed in one and the same instant; and how is it destroyed? by the descent which that very same will permitted. This would be making a will and no will at the same time, and would amount in effect to this; that a limitation of a particular estate in a will to a testator's heir at law, with a contingent remainder over, must be void in its creation, as being incapable of ever taking effect. For it is evident,

dent, that under such a construction, the particular estate never can take effect at all, its existence and destruction commencing together; and *that* being destroyed, the contingent remainder over is also gone before it has even a moment's chance for existence. Now this would be making the will *ipso facto* void. That estates created by devise, should be liable to the operation of future accidents, as much as if they had been created by any other instrument or conveyance whatsoever, appears but reasonable; for the nature of the same kind of estate when once created, is the same, whatever might have been the mode of its creation. But that is no reason at all, for rendering the limitations void in their very creation, and denying them even the possibility of ever taking effect. The general construction of wills forbids this, by giving effect to the testator's intention, so far as it can be done consistently with the established rules of law. And when in the case of a contingent remainder by devise, the law supposeth the fee to descend to the heir, until, or in default of, the contingency: it surely can be no violation of that law, to consider such descent as conditional and imperfect, where the giving it the force and effect of an absolute and perfect descent, would render the will originally and totally abortive.

But where the merger of the particular estate by the descent of the inheritance, will not occasion the limitations to be void as it were in their very creation, and necessarily deprive them *ab initio* of all possibility of ever taking effect at all; there is not the same reason to consider the descent as imperfect, or to deny it the usual force and effect of a descent in general. It is evident that where the descent of the inheritance on the particular

particular estate, is not immediate from the person whose will created the particular estate and remainder, or where the limitations are not by devise, or the descent is otherwise clear of the first-mentioned circumstances, there can be no such inconsistency in supposing the contingency to be destroyed by the descent; for in all such cases the particular estate is created, and takes effect with a capacity of being afterwards destroyed by those accidents, to which the nature of such an estate is generally subject, such as forfeiture, merger, &c. its destruction is not necessarily involved in the mode of its creation, as it must be in the former case under the same construction. There can be no necessity therefore to exempt the particular estate in these cases, from the operation of merger by the descent, in order to give such particular estate an existence, as there is in the former case. In that case we observed the limitations could never possibly take effect, if the descent of the inheritance were allowed to merge the particular estate; in the latter cases they may take effect though the descent of the fee be allowed its full force and operation; and when the particular estate has once taken effect, there is no more reason why it should be exempt from those accidental modes of destruction, to which the law subjects estates of the same nature in general; than there is in any other case, where the particular estate is merged and a contingent remainder destroyed, by the accession of the inheritance: therefore in the latter cases the descent may well be allowed its full and usual operation.

Here we must remark a distinction between the cases where a particular estate is limited,

with a contingent remainder over, and afterwards the inheritance is subjoined to the particular estate by the same conveyance; and those cases wherein the accession of the inheritance is by a conveyance, accident or circumstance, distinct from that conveyance which created the particular estate. In the latter cases we have seen the contingent remainder is generally destroyed; in the former it is otherwise. For where by the same conveyance a particular estate is first limited to a person with a contingent remainder over to another, with such a reversion or remainder to the first person, as would in its own nature drown the particular estate first given him; this last limitation shall be considered as executed only *sub modo*, that is, upon such condition, as to open and separate itself from the first estate, when the condition happens; and by no means to destroy or preclude the contingent estate.

11 Rep. 80.
Lewis Bowles
case. Hutton
119.

N B. There-
versal of a fine
by act of parli-
ament, will re-
store a contin-
gent remain-
der destroyed
by that fine,
though a re-
versal for er-
ror will not.
vid. Keb. 88.
Cole v. Le-
vingstone. &
Ld. Raym.
314.

2 Salk. 577.
1 Ld. Raym.
314.

I observed in a preceding page, that notwithstanding the particular estate might in some cases be revived, yet that the contingent remainder if once it has failed for want of the existence of the preceding estate when the contingency happened, shall never after arise. As if there be tenant for life with contingent remainder over; tenant for life makes a feoffment in fee upon condition, if the contingency happens before the condition is broken, the remainder is destroyed, notwithstanding the tenant for life afterwards enters for condition broken. But if the tenant for life enters for the condition broken before the contingency happens, the contingent remainder may vest. But in that case if the reversioner enter for the forfeiture, before the contingency happens, then is the contingent remainder destroyed; *Per Holt Chief Justice.*

As

As to the remainder's vesting, if the tenant for life enters before the contingency happens; there is a contrary opinion delivered in *Bacon's Abridgment*: where it is said the contingent remainder shall never arise, though the condition be broken, and a re-entry made before the contingency happens; because the feoffment, though upon condition, was a forfeiture and determination of the particular estate, and the recovery does not purge the forfeiture. Whether this was the opinion of Ch. Baron *Gilbert* (from whose manuscripts the greater part of that Abridgment is supposed to have been compiled) does not appear. The authority there cited certainly does not warrant so much. But however the ground of the opinion is evidently this; that notwithstanding the re-entry of tenant for life, the forfeiture still remains; now if the estate still continues forfeited, how can it be supposed to exist any more after the re-entry, than immediately after the feoffment from which the forfeiture commences? and where is there a particular estate in the one case to support the contingent remainder, any more than in the other? But notwithstanding this reasoning, it seems upon the whole, that *Ld. Ch. J. Holt's* opinion is agreeable to law: for both *Ld. Coke* and *Roll* tell us; that if lessee for life make a feoffment upon condition, and afterwards enter for breach of the condition, it will reduce the reversion to the lessor, and the estate for life will be restored; though still subject to the entry of lessor for the forfeiture. And though most of the authorities cited by *Ld. Coke* from the year books, as well as the reference of *Roll* to the same books, do not apply to the point; yet that must be ascribed to some errors in

Bac. Abridg.

v. 4. p. 315.

Vide 1. Inst.
252. a.

1 Inst. 202.

b. 1 Roll.

Abr 474.

P. d. pl. 4-5.

39 Affs. pl.
15. 4 H. 6.
page 15. b.

the print; for I find two cases in the year books (one indeed cited by *Ld. Coke*) where that point is laid down *arguendo* on one side, and admitted by the other side: from whence it seems, that after re-entry for condition broken, the lessee for life is tenant for life again, so long as the lessor does not enter upon him for the forfeiture; and consequently if the contingency happen during that interval, the contingent remainder may well vest.

3 Saund 380.
Purfoy v.
Rogers.

Carth. 262.

Raym. 28.
Flouket and
Holmes.

1 P. W. 517.
Carter v. Bar-
pardillen.

I shall conclude this tract of contingent remainders, with taking notice of two or three circumstances relating to them, which could not so properly be brought in, under either of the foregoing heads. First, it is to be observed, that where a remainder is limited in contingency, the fee in the mean time remains in the grantor and his heirs, till the contingency happens. As where a feoffment is made to the use of *A.* in tail, remainder to the use of the right heirs of *A.*, the fee simple is not in abeyance, nor in the feoffees, but results to the feoffor till the contingency happens; *Per Holt Ch. J.* So where a remainder is devised in contingency, the fee in the mean time descends to the heir till the contingency happens; as where *A.* devised lands to *B.* his eldest son, for life, and if *B.* should die without issue living at his death, that then the same should remain to *C.* in fee; but if *B.* should have issue living at his death, then the fee should remain to the right heirs of *B.*; it was resolved that *B.* took an estate for life with remainder in fee in contingency, and it was agreed that the fee descended to *B.* as heir, till the contingency happened. So where *A.* devised to *C.* for life, and in case *C.* should have issue-male, then to such issue-male and his heirs

heirs for ever, and after the death of *C.* in case he should leave no issue-male, then to *D.* and *E.*: Lord Chancellor *Parker* was clearly of opinion, that the fee descended to the heir at law of *A.* till the contingency of *B.*'s dying with or without issue-male was determined.

Secondly, a contingent remainder may, before it vests, be passed by fine by way of estoppel, so as to bind the interest which shall afterwards accrue by the contingency. As where *A.* made a feoffment to the use of himself for life, and after the death of himself and *M.* his wife, to the use of *B.* (his eldest son) for life, and after the death of *A.* *M.* and *B.*, to the use of *B.* and the heirs-male of his body, and for default of such issue, to the use of the heirs of *B.*; *B.* had issue a daughter, and then by fine and indenture granted to *D.* for 500 years, to commence after the death of *A.*; *B.* died, *M.* died, *A.* survived; it was adjudged the estate limited to *B.* was a contingent remainder; for the particular estate was only for the life of *A.* whereas *B.*'s estate was not to commence till after the death of *A.* and *M.*, and though *B.* levied the fine for five hundred years, and died before the contingency happened; yet his heir afterwards, when the contingency happened, was bound by the fine, and the lease for five hundred years to *D.* took place; for it was agreed that the contingent remainder descended to his heir, that the fine operated at the beginning by conclusion, and passed no interest, yet the estoppel should bind the heir; that upon the contingency the estate by estoppel became an estate in interest, of the same effect as if the contingency had happened before the fine was levied; that if the fine had been in fee it would have barred the heir, and operated to the benefit

Moor 554.

pl. 750.

3 P. W. 372.

Vick v. Ed-

wards.

Pollex. 54.

Weale v.

Lower.

benefit of the possession, as the fine of a disseisee to a stranger; but being only for years, the fee was vested, and the term good, being drawn out of the fee.

Pollex. 54.
Weale and
Lower.

1 Rep. 99. a
Wood's case
there cited.
Vide Vin. v.
8. p. 112.
ca. 38. Gur-
nel v. Wood.
1 Vezey. 47.
237.

Lastly, I shall observe that a contingent remainder of inheritance, is transmissible to the heirs of the person to whom it is limited, if such person chance to die before the contingency happens; this appears in the preceding case. The same law holds with respect to future uses, as where *A.* seised of the manor of *S.* covenanted with another, that when *J. S.* should enfeoff him with the manor of *D.* that he would stand seised of the manor of *S.* to the covenantee and his heirs. The covenantee died, *J. S.* enfeoffed the covenantor, and the heir of the covenantee was adjudged to be in, in course and nature of a descent.

An executory Devise defined, and its several Kinds distinguished.

1 Eq. Abr.
186.

AN executory devise is defined to be a devise of a future interest in lands, not to take effect at the testator's death, but limited to arise and vest upon some future contingency.—This is the definition commonly given of an executory devise. It comprehends indeed every species of an executory devise; but at the same time it is not confined to executory devises only; it includes every kind of contingent interest in lands given by devise, (for every contingent interest must necessarily be future); now every contingent interest

interest in lands limited by devise is not an executory devise, for some contingent interests by devise are contingent remainders; therefore such a definition must be considered as defective in point of precision and accuracy.

An executory devise is strictly such a limitation of a future estate or interest in lands or chattels (though in the case of chattels personal it is more properly an executory *beque*;) as the law admits, in the case of a will, though contrary to the rules of limitation in conveyances at common law. It is only an indulgence allowed to a man's last will and testament, where otherwise the words of the will would be void; for wherever a future interest is so limited by devise, as to fall within the rules above laid down for the limitation of contingent remainders; such an interest is not an executory devise but a contingent remainder. — As where a testator devised to his wife for life, and to her son after the death of his mother if she should have a son, and if he should die within age, then to the right heirs of the devisor; the testator died without issue, his wife married again, then the heir of the devisor conveyed the reversion to the husband and wife who had afterwards a son born; it was adjudged that the estate limited to that son should not enure by way of executory devise; because that is never allowed where a contingency is limited to depend on a freehold capable to support it; here the mother had a preceding freehold in herself, therefore it was adjudged a contingent remainder in her son; and the heir at law, having a reversion in fee in him by descent, it was held that the remainder was destroyed by his conveying the reversion to the particular estate of the mother, before the son was born,

Carth. 310.
Reeve v.

Long.
4 Mod. 258.

4 Mod. 284.
Purfroy v.

Rogers.
2 Saund. 380.

And vid. 2
Vezey. 616.
in the case of
Southby v.
Stonhouse.

But

Per Cur.
1 Salk. 226.

1 Lut. 798.
Clark v.
Smith.

2 P. W. 28.
Gore v. Gore.

But where a future interest without a preceding estate, or a contingent interest unsupported by any preceding freehold, is limited by devise; such a limitation, as it cannot be good as a remainder, shall take effect as an executory devise, provided it falls within the limits which the law prescribes, for the limitation of such executory estates. — As if one devise to the heir of J. S. after the death of J. S. it is good as an executory devise. — So where A. devised lands to B. in fee, to commence and take effect six months after the testator's death, it was a good executory devise. — So where testator devised to trustees for 500 years in trust to pay an annuity to T. his eldest son for life, remainder to the eldest son of T. (who had no son at the testator's death), it was held good by way of executory devise. In the first two of these cases, we observe there was no preceding estate, and in the latter case no preceding freehold.

1 Salk. 229.

10 Mod. 420.
Marks v.
Marks.

Executory devises are distinguished into three kinds. The first sort is where the devisor departs with his whole fee simple; but upon some contingency qualifies that disposition, and limits an estate on that contingency — As where a testator devised lands to his wife for life, remainder to C. his second son in fee, provided if D. his third son should within three months after the wife's death pay 500l. to C. his executors, &c. then he devised the lands to D. and his heirs, this was an executory devise to D.

1 Salk. 226.

The second sort of executory devises is where the devisor gives a future estate to arise either upon a contingency, or at a time certain; but does not depart with the fee at present, or limit any immediate freehold; as a devise to the heir of J. S. when he shall have one. — So where one

+ This is very true; & therefore though executory devises generally depend upon contingencies & are sometimes called *possibilitates*, yet they

may be limited to take effect on events certain. Thus it is, when a testator devises ^{that} an estate of freehold at a time future, as where the devise is to one & his heirs at the end of 21 years from the testator's death, in which case the devise cannot take effect as a remainder but is good as an executory devise. *Page's note*

Michaelmas then next ensuing, remainder to *B.* in Cro Eliz. 878.
 fee, and died before *Michaelmas*; it was adjudged Day's case.
 good as an executory devise to *B.* — So where
 one devised lands to his wife till his son should Palm. 132.
 come to his age of 21 years, and then that his
 son should have the land to him and his heirs,
 and if he should die without issue before his
 said age, then to his daughter, this was a good
 executory devise to his daughter.

The third sort is where a term for years, or any
 personal estate, is devised to one for life, with
 remainder over; such a limitation was void at Dyer 74.
 common law, and the whole property vested in pl. 18.
 the person to whom it was limited for life. There 1 Roll's Abr.
 was a distinction indeed taken between a devise 610. pl. 4.
 (or rather bequest) of the *use* of a personal thing,
 and of the *thing itself*; thus where a devise was
 that *A.* should *use* such a book for his life, and Brook Devise,
 afterwards that *B.* should *use* it, the devise over pl. 12.
 was agreed to be good; but if the first devise Cro. Car. 346.
 had been of the book itself to one for life, and
 after to another, then the devise over had been
 void. But the law is now settled that such limi-
 tations over in a *will*, or by way of *trust*, are good.
 As where a term of years was devised to *B.* after 8 Rep. 91.
 the death of *C.* and that *C.* should have it during Muth Man-
 his life, it was adjudged that this was a good ning's case.
 executory devise to *B.* of as much of the term
 as should remain unexpired at the death of *C.* —
 So where lessee for 500 years devised his term 10 Rep. 46.
 to his father for life, remainder to his sister and Lambert's
 the heirs of her body, it was resolved that this case.
 executory devise over to his sister was good. — So
 where *A.* devised his household goods to his wife 1 P. W. 1.
 for life, and after her death to his son, it was Hyde v. Per-
 decreed a good devise over to his son. — So a de- rot.
 vise of 500*l.* to the testator's daughter, and if 2 Freem. 206.

the

+ deemed an immediate devise
 of the freehold subject to the term.

by the author, was considered in this way, though there it seems
 scarce necessary to have had recourse to an executory devise, as the rem-
 + the son & daughter would have been +

she should die under 30 years of age, and unmarried, then to be divided between three; she died before the time, and it was resolved that the money should be divided accordingly.

The several Properties of Executory Devises.

HAVING shewn the distinction between the limitation of a contingent remainder and an executory devise, and given some instances of the several sorts of executory devises; I shall proceed to treat more particularly of the essential difference between the natures of those two estates, and to consider the bounds or restrictions within which the law confines the limitations of such devises.

A contingent remainder (we have seen) may be limited in conveyances at common law; it relates only to lands, tenements, and hereditaments real or mixed; it requires a freehold to precede and support it, and must vest at furthest at the instant the preceding estate determines.

An executory devise is admitted only in last wills and testaments; it respects *personal* estates as well as *real*; it requires no preceding estate to support it, and if there be any preceding estate, it is not necessary that the executory devise should vest when such preceding estate determines. But these are distinctions in the modes of their creation, rather than in the natures of the estates when created.

The great and essential difference between the nature of a contingent remainder, and an executory

cutory devise, (and that indeed which renders it material to distinguish the one from the other in their creation), consists in this, That the first may be barred and destroyed or prevented from taking effect by several different means, as I have already shewn: Whereas an executory devise cannot be prevented or destroyed, by any alteration whatsoever in the estate, *ou*: of which, or *after* which it is limited. As where a man devised lands to his son *T.* and his heirs, and if *T.* should die without issue, *living W.* his brother, then *W.* should have those lands to him and his heirs; it was adjudged that *T.* took a fee, and that the limitation to *W.* was a good executory devise to take effect on the contingency of *T.*'s dying in the lifetime of *W.* without issue, and that the recovery of *T.* did not bar this executory interest to *W.* But it is said in that case, if the person to whom the executory devise is limited, come in as vouchee in a common recovery, that his possibility is thereby given up and his heir barred.

Cro. Jac. 59a.
Pell v.
Brown.

*This is meant?
with issue by
Bigott: see Big.
on Recov. 132. but
I think without
reason. J. H.*

This privilege of executory devises against being barred or destroyed, is the foundation of an invariable rule with respect to the contingency upon which an estate of this sort is permitted to take effect; which is, that such contingency must happen within a short space of time; such as a life in being or some few years after; otherwise it would be in a testator's power to limit an estate unalienable for generations to come; a power which the law very wisely denies to every man, as the exertion of it would tend to render property in great measure useless to the general purposes and calls of a commercial society. For every executory devise, so far as it goes, creates a perpetuity; that is, an estate unalienable till the contingency

- contingency be determined one way or another. Upon this principle, although a devise to *A. and his heirs*, and if he die without an *heir*, that *B.* shall have it, is not good; because of the remoteness of such contingency, which may not happen for several generations: yet a devise to *A. and his heirs*, and if *J. S.* die, *living A.* that *B.* shall have it, is good; for this is a contingency confined to the period of a life in being.—So where a man devised land to *A. and his heirs*, provided that if he should die *within age*, that then the land should remain to *B. and his heirs*; it was a good executory devise. I must observe here, that in respect to estates of freehold by the *time of vesting*, I mean the time of *vesting of the freehold*; for although land should be limited for a term of 200 years or upwards, with remainder to an unborn son of a person then living, this executory devise to such unborn son would be good; because the vesting of the freehold is confined to the period of a life then in being; for upon the birth of such son the freehold will vest in him, or upon the death of such person without any son, it must vest somewhere else, (only subject in either case to the preceding term.) As where *A.* having two sons, *B. and C.* devised his lands to trustees for 500 years upon trusts, and after the determination of that term to the first son, *&c.* of *B.* (who had no son born at the testator's death) this executory devise to the unborn son of *B.* was held good; because it was clear the freehold must vest, either on the birth of such son, or on *B.*'s death without having had any son.
- 1 Fq. Abr.**
186. pl. 1. If one devise all his lands after the death of his executors to *A. and his heirs* for ever, but if *A.* should die *leaving* no son, then to *B.* this is
- 3 Chan. Caf.**
9.
- Palm. 136.**
- 2 P. W. 28.**
Gore v. Gore.
- Prec. Chan.**
67 Fairfax and Heron.

is a good executory devise to *B.* because the contingency is confined to the period of a life. In all the foregoing instances we may observe the contingency was confined to the compass of a life in being; and it is just the same thing if the executory devise be limited to take effect within the compass of several lives in being, for whatever may be the number of such lives, the whole period can amount to no more than the life of the survivor of them. Vid. 1 Salk. 229.

So likewise an executory devise to vest within a short time after the period of a life in being is good. As where lands were limited to *A.* for life, then to his wife for life, remainder to trustees and their heirs during the lives of *A.* and his wife, to preserve contingent remainders; remainder to first and other sons of that marriage successively in tail-male, remainder to the right heirs of *A.*; with a proviso, that if the heirs of the wife should within twelve months after the death of the survivor of the husband and wife, pay 4000 *l.* to the heirs or assigns of the husband, that then the fee should remain to the heirs of the wife: the house of Lords held this executory limitation to the heirs of the wife to be good. So where a testator devised to his wife for life, remainder to *C.* his second son in fee, provided if *D.* his third son should, within three months after his wife's death, pay 500 *l.* to *C.* his executors, &c. then he devised the same lands to *D.* and his heirs, and it was adjudged a good executory devise to *D.* The courts indeed have gone so far as to admit of executory devises limited to vest within the compass of 21 years, after the period of a life in being. As where the testator devised lands to his grandson *W.* and his heirs, and if *W.* should die under age, then

Show. Parl.
Cas. 137.
Loyd v.
Carew.

10 Mod. 420.
Marks v.
Marks.
Strange 129.

Vide infra
page 144.

Caf. Temp.
Tal. 228.
Stephens v.
Stephens.

to his grandson *T.* and if *T.* should die under age, then to such other son of the body of his daughter *M. S.* by his son-in-law *T. S.* as should happen to attain his age of 21 years, remainder over. Testator died leaving two grandsons *W.* and *T.* who both died under age, afterwards another son *T.* of the body of *M. S.* by *T. S.* was born, and it was decreed a good executory devise to this after-son *T.* if he should attain his age of 21 years; for the Judges in certifying their opinion upon that case observed, that the power of alienation would not be thereby restrained longer than the law would otherwise restrain it, that is, during the minority of the grandson who was to take it, which could not reasonably be said to extend to a perpetuity. For we have already seen that an estate may be limited so as not to vest till the end of a life in being, and then, should it vest in an infant, that infant cannot by law dispose of it before his age of 21 years.

3 Mod. 289.
1 Equit. Abr.
188. c. 11.

In the preceding case, the limitation was not confined to vest in the life either of *M. S.* or *T. S.* for they might both die leaving a son quite an infant; but it was confined to vest at the infant's age of 21, which must necessarily happen within 21 years after the death of its mother *M. S.* who was then in being. — The same point had been before admitted in the case of *Taylor and Biddal*, where a man having only one sister and heir, who had issue *A.* and afterwards married *B.* by whom she had issue *C.* and *D.*, devised lands to his sister until *C.* should attain 21, and after *C.* should have attained that age, to *C.* and his heirs; and if *C.* should die before 21, then to the heirs of the body of *B.* and their heirs, as they should attain their respective ages of 21. Testator died, *C.* died before 21, living *B.*, afterwards

wards *B.* died; *D.* (either as heir of *C.* in whom the fee was vested*) or as *heir of the body* of *B.* • Vid. 3 Rep. being of age after the death of *B.* took the estate by way of executory devise. Here we see the heir of the body of *B.* could not take till after the death of *B.* for *nemo est hæres viventis*, and since that heir of the body of *B.* who should attain 21, might not have been born before his father's death, and the estate could not vest in him till his age of 21, it is evident the estate might possibly not have vested under that limitation, till 21 years after the period of a life then in being.—So where a personal estate was limited by the testator to such of his brother's children then unborn as should attain their ages of 21, it was adjudged a good executory devise.

19 Boraston's case. Palm 132. 1 Burrow 228. and infra last page.

So that the law seems to be now settled, that an executory devise either of a real or personal estate, which must, in the nature of the limitation, vest within 21 years after the period of a life in being is good, and this appears to be the longest period yet allowed for the vesting of such estates.

Caf. Temp. Talb. 245. Sabberton v. Sabberton, Vide same point. 3 P. W. 306. Green v. Ekins. 2 P. W. 421. Maddox v. Staines.

But wherever an executory devise is limited to take effect after a *dying without heirs* or *without issue*, with no other restriction, the limitation over is void, for the policy of our law will not suffer property to be tied up, and rendered unalienable in expectation of such remote contingencies. As where lands are devised to *A.* and his *heirs*, and if *A.* die *without heir* then to *B.* this limitation to *B.* is absolutely void.—So where *A.* devised to *J. B.* and his *heirs* for ever, and if *J. B.* should die without any heir, then he devised the estate to *C.*; this limitation to *C.* was held void, because too remote.—So where *A.* having the reversion in fee

3 Leon. 111. 3 Atk. 617. Tilbury v. Barbut.

Caf. Temp.
Talb 202.
Lady Lanef-
borough v.
Fox.

of lands, (which upon the marriage of his son *B.* he had settled on himself for life, remainder to *B.* for 99 years, remainder to trustees for the life of *B.* remainder to the first and other sons of *B.* successively in tail-male, remainder to the heirs-male of the body of *B.*) devised all the lands in that settlement, *on failure of issue of the body of B., and for want of heirs-male of his own body*, to his daughter *F.* and the heirs of her body, this will did not give an estate-tail by implication to *B.*, and the devise to *F.* was executory and void, as being on too remote a contingency. But if in this case *B.* had by the settlement been tenant in tail, and there had been a remainder to *A.* in tail-male, with reversion to him in fee, then I apprehend the above devise to his daughter *F.* would have been a good immediate devise out of his reversion expectant on the estate-tail in himself.

1 Salk. 232.

1 Ld. Raym.

523.

And vide

3 Atk. 449.

For the court agreed in the case of *Badger v. Loyd*, that if a man seised in fee devise his lands to *A.* if *J. S. a stranger die without issue*, that this is an executory devise, because there is no particular estate to support it; and therefore it is void as being too remote; but that if a man seised of the reversion after an estate-tail, devise the lands to another *after failure of issue of tenant in tail*, it is an immediate devise of the reversion expectant on the estate-tail, and therefore good. — So in the preceding case, because there was no estate-tail in *B.* or in *A.* the devise of lands upon failure of *issue* of the one, and of *heirs-male* of the body of the other, was a devise of a future interest not dependent on any preceding estate; whereas if the first had been tenant in tail, with remainder to the other in tail-male, then would such a devise have been no more than the devise of a present interest, expectant

expectant on those estates-tail, capable of being barred, and therefore good.

So where tenant for life remainder to his wife for life, remainder to his own right heirs, devised in manner following; "*Item, My lands at W. my wife is to enjoy for her life, after her decease of right it goeth to my daughter E. for ever, provided she hath heirs; if my said daughter E. should die before her mother, or without heirs, and my said wife should marry again and have an heir male, I bequeath him all my right to that estate; not thinking I can sufficiently reward her love: if my said wife marrieth again and fails of heir-male, after her decease and my daughter's she failing of heirs, I bequeath 50*l. per annum* of that estate to my brother J. and his heirs for ever.*" The testator died, the wife married again, and had issue-male, afterward the daughter died without issue: Upon a question whether the heir at law of the devisor, or the heir-male of the wife was intitled to the estate: the court held the former part of the will to be no devise, but only a declaration how the estates were settled; and therefore there being no particular estate to support the limitation to the heirs-male of the wife, it could not enure as a contingent remainder; if it were an executory devise it must either be to take effect on the daughter's dying before her mother, and without heirs (by taking the word *or* for *and*, and so construing it copulatively) in which case the condition had not happened, because the daughter survived the mother; or else it was to take effect in either of the events of the daughter's dying before the mother, *or* her dying

1 Stra. 427.

2 Eq. Abr.

pl. 11. Vin.

vol. 8. p.

110. pl. 32.

without heirs: now one of these events had failed, because the daughter survived the mother, and the limitation upon the other, *viz.* of the daughter's dying without heirs was too remote.

1 Ld. Raym.
37. 4 Mod.
316. Moore
v. Parker.

Where *A.* was tenant for life by settlement, with remainder to his first and other sons in tail; the reversioner reciting the settlement, and devising in the first place according to the limitations of it, then if *A.* should die without issue of that marriage, he devised to the first and other sons of *A.* by a second wife, and if *A.* should die *without issue*, then he devised the lands over in fee; it was agreed that *A.* took nothing by the devise, consequently the limitation to the issue of *A.* by a second wife had no preceding estate to support it; and *Holt* questioned whether it was good being an immediate devise *per verba de presenti*, and if not, the limitation over could not be a contingent remainder for want of a preceding estate, and as an executory devise it was too remote, as being to take effect upon the death of *B.* without issue.

2 Burrow
873. Good-
man v. Good-
right.

So where *A.* upon the marriage of her niece *B.* covenanted to settle lands (at or after such time as *C.* the husband of her niece should settle his estate to the same uses) to the use of herself for life, remainder to trustees for 200 years, remainder to *C.* for life, remainder to trustees to preserve contingent uses, remainder to *B.* for life, remainder to the first and other sons of *C.* upon the body of *B.* in tail successively, remainder to the first and other daughters of *C.* upon the body of *B.* in tail successively, remainder to the right heirs of *A.* Afterwards, and before any settlement was made, *A.* by her will

will reciting the articles, and that she had agreed to settle the lands in manner aforesaid, devised the said lands, &c. and the *absolute inheritance* thereof, to the use and behoof of *the heirs of the body* of the said *B.* by any other husband to be begotten, and for *want of such issue*, to the use of her nephew *L.* and the heirs of his body, with several remainders over: remainder to her own right heirs. *A.* died seised; *C.* and *B.* his wife entered and suffered a common recovery, in which they were vouched; the uses of the recovery were to *C.* for life, remainder to *B.* for life, remainder to trustees to support contingent remainders, remainder to first and other sons of *C.* and *B.* successively in tail, remainder to the daughters in like manner, remainder to the uses to be jointly appointed by *C.* and his wife, remainder to the right heirs of *B.* *B.* died without issue, afterwards *C.* died; and the question was betwixt the heir at law of *E.* and the daughter of *L.* It was resolved that if the will should be taken as an execution of the articles, and as an actual devise of the particular estates, according to the limitations contained in the articles, then the subsequent limitation to the heirs of the body of *B.* by a second husband, would vest in her as an estate tail, (in remainder) and consequently the recovery suffered by her and her husband, had barred the subsequent limitation to *L.* But if a devise of the particular estates expressed in the articles could not be implied by construction, and *supposing* the devise to the heirs of *B.* by a second husband to be void, the limitation to *L.* and the heirs of his body could not be a contingent remainder (for want of a preceding estate). And it was too remote as an executory devise, being not to take place till after an indefinite failure of issue

of the body of *B.*, and being too remote in its creation, the event could not vary the construction: so that the death of *B.* without issue, could make no difference in the case; therefore either way, *L.* could have no title, unless it were considered as a present devise in possession to him; but the court held that neither the words nor the nature of the provision, would admit of that construction: and that it could not be imagined that *A.* intended to exclude all the issue of her favourite niece *B.* in order to prefer *L.* and his issue.

I observe in the report of the above case, the court delivered no express decisive opinion, as to the validity of the limitation to *the heirs of the body of B.* by any other husband, taken as a future devise; but it must be inferred from the judgment, when compared with the words of Lord Mansfield, that the court considered such limitation to have been void, for Lord Mansfield said: "*and supposing the devise to the issue of B. by any second husband to be void, the limitation to L. could not take place as a contingent remainder.*" And indeed, supposing that limitation not to have been void, then I apprehend the subsequent limitation to *L.* might well have taken place; as it would then either have taken effect in possession upon the death of *B.* without leaving issue by a second husband, or would upon her death, if she had left such issue, have vested in interest, as a remainder upon the estate-tail, then vested in such issue, *vide 2 P. W. Gore v. Gore, 2 Vezey 243. Brownfword v. Edwards*, hereafter cited, where a remainder upon a future executory limitation in tail was good. So here if the future executory limitation to *the heirs of the body of B.* had been held good, there could have been

been no objection to the remainder to *Z.* for it must have vested either in possession or interest at the same time that the preceding limitation must have vested: and if it vested only in interest, it thenceforth became liable to be barred by the tenant in tail, and therefore could not be considered as extending a perpetuity beyond what the first limitation itself would do. Therefore I think it follows, that the limitation to the heirs of the body of *B.* by another husband, was held not good; agreeably to the opinion, Lord C. J. *Holt* seems to have expressed in the preceding case of *Moore and Parker*.

So likewise the limitation of a term or personal estate, after failure of *heirs of the body*, or dying *without issue*, without other restriction, is too remote; as where a man possessed of a term devised it to one, and the heirs-male of his body, and for default of such issue to another, and the heirs-male of his body, this was adjudged a void remainder, for if it should be suffered a man might make perpetuities of a term.—So where *A.* possessed of a term, devised it to *B.* and the heirs-male of his body, remainder to *C.* and the heirs-male of his body, this was a void remainder to *C.*—So where *A.* possessed of a term for 99 years, determinable upon three lives, devised the lease to his wife for life, and after her decease to *N.* his son *for life*, and if *N.* should die *without issue* then to *B.* it was held that the remainder to *B.* was void, for that the remainder of a term could not depend on a possibility so remote as the dying *without issue*.

And in these cases where a term or other personal estate is limited to one in tail, it is an absolute and complete disposition of the whole term to him and his executors, and shall not go to his issue, nor revert for default of issue. *Tho'*

+ This rule must be understood with some restriction. for if after the limitation to one or the heirs of his body, there is a subsequent limitation on the contingency of the first devisee's dying without issue, as in the case of *Leventhorp v. Ashby*, it is a good executory devise. See 2. Atty. Gen. Rep. 87.

1 Roll. Abr. 610. p. 7. Palmer 50. Lewknor's case.

1 Roll's Abr. 611. pl. 1. Leventhorp v. Ashby.

1 Vent. 79. 1 Lev. 290. Love and Windham.

1 Roll's Abr. 611. pl. 1. Leventhorp v. Ashby. 10 Rep. 87.

In the case of *Leventhorp v. Ashby*, the limitation to the heirs of the body was held to be a good executory devise, and the remainder to the issue was held to be void. See 2. Atty. Gen. Rep. 87.

Vide 1. P. W. a distinction has been taken between such a devise of a term *in gross*, and of a term *de novo* out of the inheritance; upon Lord Coke's opinion, 8 Rep. 87. that a devise of a term *de novo* to one and the heirs of his body shall endure no longer than he has heirs of his body: indeed that distinction was not allowed to take place in the case in *P. Wms.* cited in the margin, because it appeared to be the testator's intent, that the term should not determine upon failure of issue.

362. Hayter v. Rod.
And vid. 1 Mod. 115.
and 3. Chanc. Caf. 30.
where Lord Coke's opinion was denied and indeed the latter case was determined to the contrary.

That the limitation of a personal estate to one in tail, vests the whole in him, is proved by many cases. — As where one devised that all his money in the government funds should be laid out in the purchase of lands, and settled on his eldest son *A.* and *the heirs-male* of his body, remainder to the second son *C.* and the heirs-male of his body; and bequeathed the rest of his personal estate to *A.* and *the heirs-male* of *his body*, remainder over in the same manner; Lord Chancellor held that the personal estate (*viz.* the residue after what was to be laid out in purchase of lands,) could not be intailed, but the whole vested in the eldest son. — So where long exchequer annuities for 99 years, were given by will to trustees, for the residue of the term, *in trust* for *E.* for so many years of the said term as she should live, afterwards to the plaintiffs, for so many years of the said term as they or the survivor of them should live, and after the decease of the survivor *in trust* for the *heirs of their bodies* lawfully begotten, for all the residue of the said term, and for default of such issue, in trust for the defendant. *Ld. C. King* held the remainder over to be void, and that the whole vested in the plaintiffs, to whom the limitation

1 P. W. 290.
Seale v. Seale.

Vin. vol. 8.
p. 451. pl.
25.

limitation was for life, with remainder to the heirs of their bodies; and accordingly the annuities were decreed to be sold, and the money to be paid to the plaintiffs. In this case the devise was only in *trust*, and yet the rule was the same.

So where a testator by his will devised that 400*l.* should be put out on good security for his son *T.* that he might have the *interest* of it for ¹⁵⁴ *his life, and for the lawful heirs of his body*, and

¹⁵⁴ *Butterfield v. Butterfield.*

and if it should happen that he should die without heirs, it should go to his youngest son *J. B.* Lord *Hardwicke* decreed that the whole vested in the first taker, and the limitation over was too remote.—The same point has been since adjudged in a late celebrated case, where *R. T.* by will, gave the *profits and half-yearly dividends* of 4000*l.* capital bank stock, to Sir *W. P.* during his life; together with the income and payments of six annuities payable at the Exchequer, to *receive the payments* during his life.—

And gave his dwelling house in *London*, (being leasehold) and the use of all the furniture and household linen therein, to *M. C.* during her life: and gave to *L. A. P.* (daughter of Sir *W. P.*) his dwelling-house and estate at *O*, and the *Use* of all the goods, furniture and linen there, together

Daw v. Pitt
(since Earl of Chatham) and Western,
heard at the Rolls, July 1766.

with all the cattle and cart horses, and the utensils in husbandry, as well as some other estates and leasehold houses, *during the term of her natural life*. And after the death of *M. C.* he gave to *L. A. P.* his dwelling-house in *London*, and the *use* of all the goods therein during her life.—And after the death of Sir *W. P.* he gave to *L. A. P.* the *dividends* on the 4000*l.* bank stock, and all the *payments* growing due on the said exchequer annuities *during her life*; and after her decease he gave, bequeathed, and devised all the

the afore-mentioned land, houses, bank stock, and exchequer annuities, to the *heirs-male of her body* lawfully begotten for ever; together with all the furniture in both his houses: and for want of such issue, he gave and bequeathed all the said respective estates, bank stock, and annuities, unto *W. D.* for life, remainder to the heirs-male of his body, remainder over. Upon the death of *R. T.*, *L. A. P.* entered on the estates devised to her, suffered a recovery, and sold the real estates: afterwards she devised and bequeathed all her real and personal estate to the said Sir *W. P.* (her father) his heirs, executors, and administrators. Her father surviving her, by his will after giving several legacies, gave and devised all his real estates, and all the residue of his personal estate (which residue included the leasehold estates, furniture, bank stock and annuities devised as above to *L. A. P.*) unto the defendant *W. P.* his heirs, executors, administrators and assigns. After the death of Sir *W. P.* the plaintiff *W. D.* claimed the leasehold estate, bank stock, and exchequer annuities, by virtue of the remainder limited to him in the will of *R. T.* But the Master of the Rolls held the limitation over to *W. D.* to be void, and that the whole vested in *L. A. P.* and therefore dismissed the plaintiff's bill. But upon a rehearing before the Lords Commissioners of the great seal, they reversed the order of dismissal, and decreed, that the plaintiff should have the benefit of the said leasehold estates, bank stock, and exchequer annuities, during his life. Afterwards however, upon an appeal to the House of Lords, the Lords reversed that decree, and thereby established the decision of the Rolls. Here we observe, that although only the *dividends* and *payments* of the stock and annuities

June 1770.

1771.

annuities and *use* of the furniture were devised for life to *L. A. P.* and not the stock annuities, or furniture themselves expressly, yet it was held to be the same thing : for as a devise of the *rents* and *profits* of land is tantamount to a devise of the land itself ; so *pari ratione*, a devise of the dividends and payments of stock and annuities, and of the use of furniture, is equivalent to a devise of the stock annuities or furniture themselves ; for such dividends, payments, or use, are the only produce, profits, or present value, of the stock, annuities, or furniture.

It is to be observed, That wherever a term is devised to one for a day or an hour, it is a devise of the whole term if the limitation over be void, *Vid. 1 P. W.* and it appear to be the intention of the testator ^{666.} to dispose of the whole from his executors ; but if such intention do not appear, then a limitation of a term to one for life does not vest the whole so absolutely in him as to be at his disposal, but leaves a possibility, (*viz.* upon death of devisee within the term) of reverter in the executors of the testator. Thus, where *A.* possessed of a term of 99 years devised his term to *B.* for life, and then to *C.* and so on to five others successively, for life ; all seven being dead, upon a question who should have the residue of the term, it was adjudged to revert to the executors of the testator.

*1 Salk. 231.
Eyles v.
Faulkland.*

But we are to remember that although a devise over after a dying *without heirs* is in general void, yet this rule is not without exceptions ; for if the person to whom the limitation over is made, be collateral heir to the first devisee, in ^{*Vide Cro. Ja. 415. Webb and Herring.*} that case the first devisee takes only an estate tail, because the limitation over to the collateral heir

3 Lev, 70.
Parker v.
Thacker.

Caf. Temp.
Talbot.
Tyte v. Willis.

1 P. W. 23.
Nottingham
v. Jennings.

1 Vezey, 89.
Tilburgh v.
Barbut.

3 Atk. 617.

heir plainly denotes that only heirs of the body could have been intended. As where *A.* devised lands to *B.* and his heirs, and for *want of heirs* of him, to *D.*, it was adjudged an estate-tail only in *B.* for *D.* was a near relation and heir to *B.* and therefore *B.* could not die without heirs so long as *D.* or any of his lineal heirs existed. So where *A.* devised lands to his wife for life, then to his son *H.* for life, remainder to his son *G.* and his heirs for ever, and if he should die *without heirs*, then to his two daughters; this was determined to be an estate-tail in *G.*; for it was impossible he should die without heirs whilst his sisters were living; consequently the testator by *heirs*, could only mean *heirs of the body*. The rule holds the same where the remainder is limited to the heirs of the testator himself, if such heirs must also be heirs to the first devisee. As where *A.* devised to his second son and his heirs for ever; and for want of such heirs then to the testator's right heirs; here though the devise to the testator's heirs was a mere nullity as such heirs must be in by descent, yet it was sufficient to manifest the intent and aid the construction of an estate-tail. But wherever the remainder, after dying *without heirs*, is limited over to one who is not heir to the first devisee, such after limitation will not alter the preceding positive devise in fee, nor will the courts in that case go so far as to restrain the general import of the word *heirs* to that of the words *heirs of the body*. So where the testator devised to his son *and his heirs*, and if he should die *without heirs*, remainder over to another who was half brother to the first devisee; upon a question made, Whether the first limitation was in fee or in tail? Lord *Hardwicke* said, it was a plain case, and one of those

those points which the court would not suffer to be argued, as having been determined before. This was a devise over to a stranger, as the law considers him, and who could not in any event inherit as heir to his brother.

Again, a devise may be to one and *his heirs*, with an executory devise over, limited to take place on an event which must happen within the compass of a life in being. As where a testator devised to *A.* and his heirs, and if he should die before twenty-one, then to *B.* and his heirs; this was a good executory devise to *B.* Upon the same principle, though an executory devise to vest on a dying without issue generally is not good, because too remote, yet where the dying without issue is restrained to the period of a life in being, an executory devise thereon limited will be good. As where the testator possessed of a term for years, devised the lands to *B.* and to the heirs of his body, and if *B.* should die without issue, living *C.* then to *C.* the court held this a good limitation to *C.* the contingency being to arise within the compass of a life in being. So where a testator devised his term to his wife for life, and after her death to *R. F.* for life, and after her death to *T. F.* and his children, and if the said *T. F.* should happen to die before the expiration of the said term, not having issue of his body then living, then to go over to *D.* for the residue of the term: this limitation to *D.* was decreed good, the contingency being confined to a death without issue then living; for though it was contended, that the words *then living* related only to the other words *before the expiration of the term*, yet it was answered, that those words must relate to the time of the death, otherwise there would be no difference between this

Vin. 8. fol.

112. pl. 38.

Gurnel v.

Wood.

Vide Duke of

Norfolk's case,

3 Chanc. Cas.

1. &c.

1 Salk. 225.

Lamb. v. Ar-

cher.

1 Eq. Abr.

193. Hlet-

cher's case.

Vide supra
page 129.

2 P. W. 421,
Maddox v.
Stains.

3 Atk. 282.

this and the common limitation over of a term if one *die without issue*; for there it must be intended *dying without issue before the expiration of the term*, there being nothing to limit over after the expiration of the term. So it is if the *dying without issue* be confined to the compass of 21 years after the period of a life in being. As where a testator devised the residue of his personal estate to his niece *A.* (wife of *B.*) for life, and after her death, the yearly produce thereof for the maintenance of *such children* as she should have by the said *B.* until the sons should be 21, and the daughters 18, who were to be paid their portions at such respective ages, and for want of *such issue*, remainder over; it was decreed a good limitation over, as by *such issue* must be meant such children of *A.* and *B.* as should attain the age or ages aforesaid; which contingency must in all events be determined within 21 years after the death of *A.*—Again in the case of *Sheffield v. Lord Orrery* where the testator, if he should leave no legitimate son or daughter who should leave any child behind them, in such case of their dying without leaving issue behind them, willed and directed, that *C.* should have his estate both real and personal, &c. one question was, whether the limitation of the personal estate, was not too remote? Lord *Hardwicke* held that the limitation being confined to the period of a life, was warranted by the rules of law; and he observed that although it was certain that a limitation of a personal thing, could not be allowed after a dying without issue generally; yet if it were confined to the extent of a life or lives in being, or within ten months or the birth of a child, after a life in being, or to the death of such child before the age of 21, or if limited on a con-

contingency to a person who never takes, the limitation is good. *li- Vide infra.*

Indeed with respect to executory devises of terms for years, or other personal estates, the court of Chancery has very much inclined to lay hold of any words in the will, to tie up the generality of the expression of *dying without issue*, and confine it to dying without issue *living* at the time of the parent's decease. As where a term was devised to *A.* for life, remainder to such children as the testator should leave at the time of his death, and if all such children should die without *leaving* any issue, then to *B.* this was a good executory devise to *B.* and the words "Without *leaving* any issue" were understood to mean "*leaving any issue* at the time of their deaths."—So when a testator devised a personal estate, in trust, to be settled on his daughter *or the heirs* of her body, but in case his said daughter should die *leaving* no heirs of her body, then over to others, Lord *Hardwicke* decreed the limitation good, upon the contingency of the daughter's dying without issue *living* at her death, as he considered the word *leaving* as relating to that time. So again in another case, the words *and leave no issue* were construed "*leave no issue living* at the time of her death."—In the case of *Pinbury and Elkin*, where one made his wife executrix, and gave her all his goods and chattels, provided that if she should die *without issue* by the said testator, *then after* her decease, 80*l.* should remain to the testator's brother, the words *then after* were taken to mean *immediately after*, and consequently to restrain the dying without issue to the time of her death. So where the testator devised a term to his son *A.* for life, and no longer, and

3 P. W. 258.

Atkinson v.

Hutchinson.

Vide same

point.

1 P. W. 663.

Forthv. Chap-

man.

2 Atk. 647.

Read v. Snell.

3 Atk. 396.

Lampley v.

Blower.

2 P. W. 563.

1 P. W. 432.

Target v.

Gaunt.

after his decease, to such of the issue of *A.* as *A.* should by will appoint, and in case *A.* should die *without issue*, then he devised the same over; these words upon the whole of the will, were construed to mean, without issue *living at his death*; for it was to be intended such issue as he should or might appoint the term to, that is, issue *then living*.

1 P. W. Nicholls v.
Hooper 198.

So where *A.* devised lands to his wife for life, remainder to his son *T.* and his heirs; provided that if the said *T.* should die without issue of his body, then he gave 100 *l.* a-piece to his two nieces *C.* and *D.*, to be paid *within six months after the death of the survivor of the said A. and T.* by the person who should inherit the premises, and in default of payment as aforesaid, the testator devised the lands to the legatees for payment: this dying without issue was construed a dying *without issue living at his death* (for it clearly appears, that an indefinite failure of issue at any time was not meant, by the legacies being limited to be paid within six months after the death of the *survivor* of the mother and son) and therefore upon the event such a contingency the limitation would have taken effect: but as the son died leaving issue, though that issue died within six months after the death of the son, the court held the legacy not due; as the contingency (of dying without issue *then living*) had not happened. It is said indeed in the report of this case, that where a legacy is given on a *dying without issue*, it shall be understood a dying without issue *then living*. But it is to be observed that such a construction was not necessary to make the limitation good in this case, for the reasons I have given; and that such a construction is not allowed without some restrictive

Vide 2 Atk.
313.

strictive circumstances in the limitation, *Vide Gibb. 58. Green v. Rod. and 1 Burrow 272-3.* and other cases hereafter cited. — Again where *A.* having two nephews *A.* and *B.* devised the surplus of his personal estate to them, and if either of them should die without children, then to the *survivor*. It was held that dying *without children* must in this case be taken to be dying without *children then living*; because the immediate limitation over was to the *surviving* devisee — So where *A.* devised portions to his four children, payable at their respective ages of 21 or marriage, and in case any of them should die before the time of payment, or *without issue*, then his or their portion to go to the *survivors or survivor*, and his heirs: it was held this could not be a dying without issue generally, but so as the *survivor* might take, which must be during the lives of some of them, and so was good.

It has indeed been held that where the *interest* of money was devised to one for life, and if he die *without issue*, the *principal* to go over; that such a limitation was good, upon a distinction taken, between the devise of the interest of money, and of money itself. But that distinction has been repeatedly over-ruled and exploded. *Vide* the cases of *Butterfield v Butterfield*, and of *Lord Chatham*, before cited.

There is a case of a very different nature from the foregoing, where a portion for a daughter limited after an indefinite failure of issue-male was allowed to take place. It was the case of a settlement on husband and wife, for their lives, remainder to the first, &c. son in tail-male, and if the husband should die *without issue-male*, remainder for a term to raise 1500*l.* for portions for daughters; the husband died, leaving issue a son and

¹ P. W. 534.
Hughes v.
Sayer.

Chanc. Prec.
528. Nicholls
v. Skinner.

² Chan. rep.
410. & vide
same case.
² Vern. 38.

supr; page
139.

¹ Lev. 35.
Goodwin v.
Clerk. ² Sid.
102.

a daughter; the son died without issue; it was adjudged that the daughter should have the 1500*l.*; for that whenever the issue-male of the husband failed, he might properly be said to be dead without issue male: here we observe, as there was a preceding estate-tail, a recovery suffered by tenant in tail would have barred this term, and the daughters portions; and therefore the allowing the limitation to take effect, was not running into the inconveniences of an executory devise, limited on so remote a contingency; because this limitation was liable to be barred, whereas an executory devise is not.

But though the courts, in the case of *personal estates*, will incline to construe a limitation after dying *without issue*, to be a dying without issue *living at the death* of the party, wherever any ground is afforded for such construction, in order to support the devise over. Yet in the case of a real estate, the case is different; there we are to consider the interest of the heir at law is concerned, which is always much favoured by our laws.

Comyngs 373, Therefore where a testator devised, that if *W.* his
374. son should happen to die, and *leave no issue* of his body lawfully begotten, that in that case and not otherwise, after the death of *W.* his said son, he gave and bequeathed all his lands of inheritance in *L.* unto *B.* another of his sons, and his heirs; it was held, that *W.* took an estate-tail by implication; and the limitation to *R.* was a contingent remainder, and not an executory devise.

Vide foregoing cases, and We are to observe, however, that in all cases of
2 Ark. 647. personal estates, where such restrictive circum-
Read v. Snell. stances as I have been instancing appear, it matters not whether the term or other personal estate be limited to the first taker *absolutely* or
for

for life, or to him and *his heirs* or *issue*; for the restriction will be equally valid under any of those circumstances, and give effect to the limitation over.

A diversity has in some cases been contended for, between a limitation of a term, by such words as in the case of a real estate would give an *express* estate-tail, and a limitation of the same by such words, as in the case of a real estate would only give an estate-tail by *implication*; upon this principle; that where the words of a will, if used with regard to an inheritance, would give an *express* estate-tail, there the same words applied to a term will pass the whole interest in that term; but that, where the words of the will, if applied to a freehold, would give an estate-tail by *implication* only, there they will not enure to give the whole interest in the term; and consequently, that where a term is limited to one, and if he die *without issue*, remainder over, this limitation will not vest the whole term in him, as a limitation to the *heirs of his body* or to *his issue* would do; but are always to be understood restrictively, and to relate only to his dying without issue *living at his death*, and therefore give him the term only during his life. The ground of the distinction is this; in respect to an inheritance the words, *dying without issue*, are taken to mean an indefinite failure of issue, in order to create an estate-tail in favour of the issue; who are capable of taking an *inheritance*; but with respect to a term, such a construction cannot benefit the issue, because a *term* cannot descend to them. In some instances, it is true, the court seems to have countenanced a distinction of this sort, as appears in *P. W.*'s reports of some of those cases which I have last cited from him; but in all

Vide: P. W.
433, 564,
667. 3 P. W.
260.

those cases, as I have before noticed, there were some circumstances in the will, which the court observed confined the generality of the expression, *dying without issue* to *dying without issue then living*. This appears in the reports of the respective cases, except in that of *Fortb* and *Chapman*, in which *P. Wms.* does not notice the court's regard to the particular penning of the will. But Lord *Hardwicke* observed, 2 *Atk.* 313. that *he* was counsel in that case, and that Lord *Macclesfield* laid a good deal of weight on the words, and *leave* no issue.

It is obvious that if the court had grounded their decisions on such a distinction as I have mentioned, it would have been needless to have inquired into, or insisted upon those circumstances of restriction upon which, in delivering their opinions, they laid so much stress. Besides, where no such circumstances have appeared, it has been determined, that the limitation of a term over after a *dying without issue*, is to be taken in the legal extent of the expression, and therefore the limitation over being (in that sense) too remote, is utterly void. This appears in the case

1 Lev. 290.

2 Freem.

210. Burford
v. Lee.

2 Freem.

287. anon.

Gibb. 68.

Green v. Rod.

3 Geo. 2.

of *Love* and *Wyndham* before-cited.—So where a term for 1000 years without impeachment of waste, devised to *L.*, and if he should die without issue, then to *B.*; the court held that the remainder was void, and that the whole vested in *L.*, his executors and administrators.

— And where a personal estate was devised to *A.*, and in case she should die without issue, then to *B.*, it was resolved that the devise over to *B.* was void, and the whole decreed to *A.*—Again in a later case, where *A.* possessed of a personal estate, appointed by will, that it should be sold, and the money arising from the sale be to the use of his sister *M.*, and if she should die without issue, it should go equally between his

other

other sisters; and in a subsequent clause it was said, *then after the death of his sister M. in manner aforesaid, &c.* There it was contended, that although the first limitation to *M.* contained nothing to restrain the generality of the meaning, *of dying without issue*, yet the words in the subsequent clause *then after the death* amounted to a restriction, which confined it to a dying without issue *living at the death* of *M.* But the court observed that the words, in *manner aforesaid*, prevented such a construction, because they referred to the first limitation, and were tantamount to a repetition of it; which being a dying without issue generally, the limitation over was too remote, and therefore void.

The distinction I confess, seems in some measure to have been admitted in the case of *Atkinson v. Hutchinsen*. But the decree in that case ^{3 P. W. 258.} does not appear to have been founded upon it: the limitation there, was, by the words *without leaving issue*, the import of which I have before noticed; and there was a preceding limitation upon the death of any of the children without leaving issue, to the *survivors* of them; now this clearly could not be understood of an indefinite failure of issue, because confined to a *survivor*; and it was but reasonable to give the same words the same construction, in the subsequent limitation, which they must bear in a limitation immediately preceding. And in a case of later date, where the testator said, *M. D. I make my sole heir* ^{2 Atk. 308.} *and executrix, and if she die without issue*, then ^{Beauclerk v. Dormer.} to go to *L. B.* Lord Hardwicke held, that no authority came up to supporting the point, that *ex vi termini* such a limitation of a personal estate should be confined to a dying without issue *living* at the death of the first taker; and that as the limitation was general, and not restrained by any circumstance in the will, the devise over

1 Atk. 376. *Saltern v. Saltern.* was void. And Lord *Hardwicke* was of the same opinion in a subsequent case, when he said “Where there is a devise of a lease for years to a man, and if he die without issue remainder over; there is no doubt but the whole interest vests in the first taker.

Jan. 1768. Indeed since the case of *Beauclerk v. Dormer*, there was the case of *Keily and Fowler* determined in the House of Lords, upon an appeal from the court of *Chancery* in *Ireland*, where *W. C.* left and bequeathed unto his daughter and only child, all his worldly substance, lands, stock, corn, debts, and household goods, provided she married by the consent of his executors therein mentioned: but in case she married without the consent of his executors, she was to have only twenty cows, and a horse for her whole fortune: and after naming *A.* and *B.* his executors, he appointed that in case his said daughter should die *without issue*, that all his said substance should return back to his executors, to be distributed as he should thereafter direct.—And lastly in case his daughter should marry without consent, or die *without issue*, he appointed that all his said substance, &c. should return back to his executors to be by them distributed in manner following; viz. to his nephew *J. D.* 100*l.* to *H. G.* 50*l.* to each of his executors *aforesaid* 50*l.* to his daughter twenty cows and a horse only, and the remainder to be equally divided amongst the children of his sister *E. F.* The question was, whether the limitation over of the personal estate after the death of the testator's daughter without issue was good? the court of *Chancery* in *Ireland* held it was: and their decree was confirmed by the House of Lords here, upon the opinion of the judges that

that the bequest over, was to take affect on the death of the daughter without *issue then living*.

Now in this case we may observe one material circumstance restrictive of the general import of the words *die without issue*, which was, that in such event, the estate, &c. was directed to *return back to his executors* to be distributed by them (*viz.* the executors he had named, for upon the same event he gave to *each of his executors aforesaid*, 50 l.) Now this was a personal trust in those particular executors, to be performed *by them* after the determination of the first estate, by either of the two events of his daughter's marriage without consent, or her death without issue. Therefore we must suppose the testator to have considered both these events to be such, as if they happened at all, would in all probability happen in the lifetime of his said executors, or one of them; otherwise we make him repose a trust in his executors, inconsistent with a probability of their living to perform it. Now a general indefinite failure of issue, is an event in contemplation, too remote to be confined to the period of any life in being; therefore it was reasonable in this case to construe the words *dying without issue*, dying without issue *then living*, in order to reconcile the extent of the limitation to his daughter, to the nature of the trust reposed in his executors, and make the whole will consistent. As to any thing that might be inferred from the devise over to his sister's children being intended as a *personal provision* for them, as much may in all cases be inferred from a devise over to any relation or other person; and therefore I conceive amounts to nothing at all: nor indeed did the case want any further assistance; for the circumstance respecting the trust in his executors, was particular and strong.

— I therefore apprehend, the judgment in the case of *Keily* and *Fowler*, does not at all clash with the decision of Lord *Hardwicke* in the case of *Beauclerk* and *Dormer*. But that both of those decisions concurred, in allowing the above distinction, the very same extent and force which former cases seemed to have established, and no more; which from a comparative view of all the cases, appears to be this; viz. that although in the limitation of a personal estate, after a dying *without issue*, those words shall not *ex vi termini*, and *without* the concurrence of any other circumstance of intention, signify a dying without issue *then living*; yet on the other hand they shall not *ex vi termini*, and when there *is* any other circumstance of intention, import an *indefinite* failure of issue; but that any clause or circumstance in the will, which can indicate or imply such intention, shall confine their signification to a dying without issue *then living*.

1 Eq. Abr.
362. pl. 12.

It has been said, that where a personal estate was limited to one *for life expressly*, and if he die *without issue* remainder over; that such remainder over was good, because the express estate for life should not be enlarged by mere words of implication. The place cited for this point in 1 *Eq. Abr.* is 1 *Chanc. Rep.* 411. which must be an error in print, for there is no such page or case in the book; in 2 *Chanc. Rep.* 410. indeed, there is the case of *Smith v. Clever*, which is also reported in 2 *Vern.* 38. under the name of *Smith v. Farmer*, in which it was held, that where the *interest* of money was devised to one *for life*, and if he should die *without issue*, the *principal* should remain over, that the limitation over was good. But that decision turned upon a different principle; for that case was determined

terminated solely upon the distinction taken between a devise of the interest of money to one for life, and a devise of the money itself. But that distinction has since been exploded by the cases of *Butterfield v. Butterfield*, and of Lord *Chatham* before cited. And it appears from the general tenor of the cases cited in the preceding pages, that, with respect to the validity of the limitation over, it is just the same thing, whether the devise of a personal estate be to one *for life*, expressly, and if he die without issue remainder over, or to one and if he die *without issue* remainder over. Thus in the case of *Love v. Wynham*, the devise was to one for life expressly, and if he die without issue remainder over, and the remainder was held void.

So in the case of *Clare v. Clare*, though Lord *Talbot* held that the subsequent limitation to the issue, did not enlarge the express estate for life given to the first devisee; yet he also held that the remainder over upon the extinction of issue-male (which is equivalent to a *ying without issue*, when taken as an *indefinite* failure of issue) was void. The only difference between a limitation of a term, &c. to one *for life* expressly, and if he die without issue remainder over, and a limitation to one and if he die without issue remainder over, seems to be this; that in the latter case the whole vests in the first devisee, whereas in the former it seems by the better opinion, that it returns to the executors of the devisor, after the death of tenant for life: Vide the cases cited in the margin, and also the case of *Clare and Clare. Cas: Temp. Talb.* 21. where Lord Chancellor held, that the limitation to the issue did not enlarge the express estate for life in *Thomas*; but that the residue of the

Vide *supra*.
P. 147.

Cas. Temp.
Talb. 21.

² *Freem.* 210,
287.
Vide ¹ *Salk.*
231. *Eyres*
v. Faulkland.
And *supra*,
page 141.

the term after the life of *Thomas*, vested, in him as residuary legatee of his father.

Vide 3 Atk.
447.

Upon the distinction between a dying without issue generally, and a failure of issue confined to the period of a life in being; it seems that though an executory devise *in tail* or in fee, to one *in esse* after a dying *without issue* is void; yet an executory devise may be *for life*, to one *in esse* to take place after a dying *without issue*; because in the latter case, the future limitation being only for life, it must necessarily take place during that life, or not at all; and therefore the failure of issue in that case is confined to the compass of a life in being.

Vin. vol. 8. p.
451. pl. 25.
2 Atk. 376.
2 Vezey
233-6. 646.
660.

We have seen, in the preceding part of this treatise, that in respect to limitations of real estates, where an estate for life is given to the ancestor, followed by a limitation to his heirs general or special, the subsequent limitation vests in the ancestor, and the heir takes not by *purchase*. But in the limitation of personal estates, a similar rule does not always hold. If a term be devised to one *for life*, and afterwards to the *heirs of his body*, these words are generally words of *limitation*, and the whole vests in the first taker: as is evident from several of the cases before cited, as well as from the cases here referred to in the margin: but if there appears any other circumstance or clause in the will, to shew the intention that these words should be words of *purchase*, and not of *limitation*, then will the ancestor take for life only, and his heir will take by *purchase*.—Here I must observe, that an

1 Vern 234.

2 Vern. 43.

195. Peacock
and Spooner.

2 Freem. 114.

executory devise of a term and the limitation of the trust of a term are governed by the same rules.—Thus where a term for 900 years was assigned to trustees in *trust*, to permit the husband

husband and wife, and the survivor of them, to receive the profits for so many years as they, or the survivor of them, should happen to live, and after their deaths, to the use of *the heirs of the body* of the wife by the husband to be begotten; it was held, that the heir of the body took by purchase, and that it did not vest absolutely in the mother who survived, so as to go to her administrator. This was the decree, and the decree was afterward affirmed in the House of Lords. The same point was afterwards decreed in a similar case of *Dafforne v. Goodman*, which latter^{2 Vern. 362.} decree was entirely grounded on the authority^{2 Freem. 231.} of the preceding. It is true no particular expression in either of these cases determined the intent to be, that the heir of the body should take as a purchaser; but these being cases of marriage-settlements, it was reasonably enough inferred, that the issue of the marriage were intended objects of the settlement, and the term not designed to vest wholly in the mother. But afterwards, in a subsequent case of a marriage-settlement, a decree at the Rolls, grounded upon the case of *Peacock and Spooner*, was reversed, and the limitation to the heir-male decreed to be void. The case was this: On the marriage of *A.* his grandfather assigned a term for 100 years^{1 P. W. 132.} in trust for *A.* for life, then to *A.*'s wife for life,^{Web v. Web.} and after their deaths for *the heirs of the bodies* of *A.* and his said wife, the wife died leaving^{And vide 1 P. W. 360.} issue, *A.* survived; it was decreed that the whole^{Hayter v. Rod.} term vested in *A.* This last case appears to have been the ruling authority ever since in cases of the like nature, and that of *Peacock and Spooner* is only attended to in cases exactly the^{Vide 2 Vez. 660.} same in *specie* with itself, as was that of *Dafforne v. Goodman*, as reported by *Freeman*. But there have

2 Atk. 89.
Hodgson v.
Bulley.

Vide Barnardist. Rep. in Chan. 199.
2 Vezey, 660.

2 Atk. 642.
and vide case of Paine v. Stratton, there cited.

3 P. W. 262.
Low v. Burron. 2 Atk. 376. Saltern v. Saltern.
2 Vezey 681.
Williams v. Jekyl.

have been other cases, which have proceeded entirely upon circumstances of evidence of the intention. As where a term was settled in *trust* for one if she should so long live, and after her decease, in trust for her husband if he should so long live, and after his decease, in trust for the heirs of the body of the wife, begotten by the husband, and *their executors, administrators and assigns*; Lord Hardwicke decreed, that the limitation to *the heirs of the body, &c.* were words of purchase, as he held the addition of the words *executors, administrators and assigns*, strong evidence of the intent to give only an usufructuary interest for life, and to vest the property in the heirs of the body. The like point was decreed in the case of *Read and Snell* before cited, in which case the decision was grounded on the words *leaving no heirs of her body*, which were considered as relative to the time of her death, and therefore restrained the general import of the preceding limitation, to the life only of the first taker.

It seems that if a person seized of an estate *pur autre vie* or for the lives of several, devise the same to another *for life*, or to another and the *heirs of his body*, with remainder over, or to another, and if he die *without issue* remainder over; the limitation in these instances, makes no estate-tail; for all estates-tail must be of inheritance; yet nevertheless it appears, that the limitation to the issue as well as the remainder over is good, provided the first devisee die without any disposition of the estate. But the first devisee it seems may if he thinks fit dispose of the whole, and bar as well the remainder over, as his own issue. That the remainder over is good, and that the issue may be barred, appears in the case cited from *P. Wms.*: that the remainder over,

over, as well as the issue may be barred, appears from the case of the Duke of *Grafton*, reported in the note, 3 P. W. 266. and the case cited from *Vezey*; and, that if the first devisee die without any disposition, his issue, or in default of such, the remainder man will take by special occupancy, appears from the cases cited from *Atkins* and *Vezey*.

+ also from
2. Kern 265

Wherever one limitation of a devise is taken to be executory, all the subsequent limitations must likewise be so taken. This is laid down as a rule by *Serjeant Pemberton* in the case I have cited in the margin; for (says he) the several limitations of a devise of one and the same thing, shall never be made to operate several ways (*viz*) some by way of executory devise, and others by way of remainder. The court seemed to admit the truth of the position; but it may be worth while to consider upon what reasons it is grounded, for in the course of practice, questions frequently arise, which turn upon this very point.

Vide Carth.
310. Reeve
and Long.

With respect to the devise of a term, it is clear, that if there be 20 limitations of it after a devise to one for life, &c. every one of the 20 will be equally executory as the first of them; because all are equally limitations of a term after a disposition thereof for life, which cannot hold otherwise than by way of executory devise. Therefore the question can only arise with respect to the devise of a freehold; and there we are to consider, that every executory devise is either the limitation of an estate after the fee has already been disposed of, or else is a freehold to commence *in futuro*, without any preceding freehold to support it. In the first case it is evident, that every limitation subsequent to the first

Vide *Supra*,
page 62.

Vide *supra*,
page 82.

first executory devise, must be also executory; because it is also a limitation of an estate after the fee has already been disposed of. In the latter case, the first *executory* limitation, being the first freehold limited by the will, no freehold can vest in possession under that will before the time limited for such limitation to take effect; if it could, then would that supposed *executory* limitation be really *not executory*, because it would in that case be supported by a preceding vested freehold. It is true, that with respect to *contingent remainders* a subsequent vested remainder may *vest in interest* before a preceding contingent remainder, as I have before observed when I was treating of contingent remainders; but that is only where some preceding freehold vests *in possession* in the mean time: but no subsequent remainder can first vest in possession, and afterwards a preceding estate take place; for where-ever a subsequent limitation vests *in possession* before a preceding contingent one can arise and vest, such preceding one is utterly destroyed, as we have already seen. But in the case, now under consideration there is no freehold limited to vest immediately in possession. We cannot make the preceding estate and the remainder change places, and the latter come into possession before the former; this would be absurd, and directly contrary to the order of the limitation. If this cannot be done, then no one of the subsequent limitations can take place before the time limited for the first; they are all therefore equally freeholds to commence *in futuro* without any present limitation freehold, to support them, and consequently are all equally executory, till the time comes for the first estate to vest or fail, then all the subsequent limitations may vest, and no longer

longer continue executory. Thus where *A.* having two sons *B.* and *C.* devised lands to trustees for 500 years, upon trust to pay an annuity of 50*l.* *per annum* to *B.* for life, and after the determination of that term to the first and other sons of *B.* in tail, remainder to *C.* for life, and *B.* at the testator's death had never had a son born; here it was held that till the event of *B.*'s having a son should be decided one way or the other, by the birth of such son, or by *B.*'s death without one, the freehold descended to the devisor's heir at law. Therefore till the birth of such son or *B.*'s death without one, *C.*'s remainder must have been executory, being a freehold limited to commence *in futuro*, without a preceding freehold to support it; for the freehold descending to the heir at law of *A.* was no part of the limitation in the will; but only descended in consequence of its not having been thereby limited, and therefore had no connection with *C.*'s remainder in the light of a preceding estate.

But although if one limitation be executory, every subsequent one must be so likewise; yet a preceding executory limitation may be uncertain and contingent, when a subsequent limitation, though future may be certain, and be so limited as to take effect, either in default of the preceding limitation, or by way of remainder after it, if that should take effect: in either of those cases, we see, it must vest at the time appointed for the preceding limitation to vest; for should the preceding limitation fail, the subsequent one will then vest in possession; should the preceding take effect, the subsequent one will at the same instant vest in interest as a remainder upon the preceding one, and then be-

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come

2 P. W. 28.
Gore v. Gore

2 Vezey, 243.
Brownfword
v. Edwards.

come liable to the same modes of destruction as other remainders of the same kind are subject to.—Thus, where there was a devise to trustees in fee until *B.* should attain 21; and if *B.* should attain 21 or have issue, then to *B.* and the heirs of his body, but if *B.* should happen to die before 21 and without issue, remainder over; *B.* attained his age of 21, and afterwards died without issue: Lord *Hardwicke* considering the word *and* as used for *or*, and the condition as disjunctive instead of copulative, decreed that the remainder over should take effect, upon the apparent intent of the testator, that it should take place, either in default of *B.*'s attaining 21, or on his dying without issue.

Vide supra,
page 64.

It is to be observed, That where a limitation in a will, is made after a preceding executory or contingent limitation, or a devise is limited to take effect on a condition annexed to a preceding contingent estate; if that preceding limitation or contingent estate never should arise or take effect, the remainder over will nevertheless take place, the first estate being considered only as a preceding conditional limitation, and not as a preceding condition to give effect to the subsequent limitation.

1 Salk. 279.
Scatterwood
v. Edge.

As where a devise was to trustees for 11 years, remainder to the first and other sons of *B.* successively in tail, provided they should take the testator's surname, and if not, or they should die without issue, remainder to the first son of *C.*; *B.* died without having had any issue, *C.* had a son at the time of the devise, the court did not agree as to the validity of the first devise; but resolved that the remainder took effect, and that the limitation to the sons of *B.* was not a precedent condition. So where *A.* possessed of

a term for years, devised it to his wife for life, and after her death to the child she was then *enseint* with, and if such child should die before the age of 21, then one-third part of the said term to his said wife, and the other two thirds to certain other persons; one question was whether this devise to the wife was good as the event happened, because the wife was not *enseint*? and it was held that it was good.—But where there was a devise to *A.* and his heirs, upon condition that he should pay all the testator's debts and legacies, and if he did not, then to *B.* in fee; *A.* died in the lifetime of testator, this devise to *A.* was a lapsed devise, and it was adjudged that the devise to *B.* being a condition annexed to the first devise, as that was gone, the condition and subsequent estate depending thereon was also gone.

1 Eq. Abr.
245. Jones v.
Westcomb.

Fortescue
184. Roe v.
Fludd.

But the authority of this last case has been over-ruled by several subsequent determinations. Thus in the case of *Hopkins v. Hopkins*, where the first devisee died in the lifetime of the devisor; the contingent remainders over, as they were not vested at the devisor's death, were held to enure by way of executory devise. So where *A.* devised to his wife for life, remainder to a child of which she was supposed *enseint*, in fee; but if such child should die before 21 leaving no issue, remainder over: No child was born, and it was adjudged that the limitation to the child was a contingent remainder, and the remainder over a good executory devise; which as the preceding contingent remainder never vested, took effect on the death of the wife.—So in the case of *Avelyn v. Ward*, where *A.* devised his real estate to his brother *B.* and his heirs, on condition that *B.* should give a release

Caf. Temp.
Talb. 44.
Vide infra.
page 169.

Will. 105.
Wickett v.
Gulliver.

1 Vezey 420.

N. B. The case of Wickett v Golliver above cited was a case arising upon the same will as that of Jones v. Westcomb Vide 3 Burrow, 1624.

within three months after the testator's death; but if B. should neglect to give such release, he devised it to R.; the first devisee died in the lifetime of the testator, and it was decreed that the devise over should take place; and though a distinction was contended for, between the case of a remainder over after an executory particular estate only, and those cases wherein an executory devise was introduced after a disposition of the whole fee, yet Lord Hardwicke exploded that distinction, as he did not find (he said) any authority to warrant it; and he thought the case of *Jones v. Westcomb* above cited, a strong authority, that the construction ought to be the same, whether it be the case of a remainder limited conditionally after a particular estate, which never takes effect, or whether it be a contingent limitation after a fee.

4 Mod. 259.

It has been said indeed, That in cases of executory devises there can be no limitations over, by which is meant, that where the whole interest is once limited by way of executory devise, it cannot be again limited over on another contingency: For where the whole interest was not limited in the first executory devise, there could be no doubt as to the validity of a further limitation, because there still remained something more to limit.

Pollex. 33.
Backhouse's
case.

It is true it was formerly held, that wherever the first executory limitation was in such words as would convey the whole interest, there any subsequent limitation was void, notwithstanding the preceding limitation never took effect; as where a term was limited to a man for life, and afterwards to his first and other sons in tail successively, and for default of such issue, remainder over, this remainder was held void, though no son

son was ever born, because the first limitation to Vid. same
 the sons in tail was an executory devise of the point.
 whole interest: so that wherever an executory ^{1 Mod. 115.}
 devise would, if it had vested, have carried the ^{Burgiss's cas.}
 whole interest, no limitation over could be good
 even though the preceding never vested. But
 these cases have long since been denied to be law;
 and it seems now to be settled, that whatever
 number of limitations there may be after the first
 executory devise of the whole interest, any one of
 them may be good in event, provided it be so
 limited that it must take effect within 21 years
 after the period of a life then in being, and
 no one of the preceding executory limitations
 happen to vest. But when once any one of
 such preceding executory limitations happens
 to take place, that instant all the subsequent
 limitations become void, and the whole interest
 is vested. As in the case of *Stephens v. Stephens*,
 where a devise was in these words, "I give and
 devise unto my grandson *W.* all the lands, &c.
 "to him, *his heirs and assigns for ever*, but in
 "case my said grandson *W.* shall happen to die
 "before he attains the age of 21, then I give
 "and bequeath to my grandson *T.* all the said
 "lands, &c. to him, *his heirs and assigns for ever*,
 "but in case my said grandson *T.* shall happen
 "to die before he attains 21, then I give all the
 "said lands to such other son of my daughter
 "M. S. by T. S. as shall attain the age of 21,
 "his heirs and assigns for ever, and for default
 "of such issue, then to the daughters of M. S.
 "by T. S. in tail, and for want of such issue,
 "then to Sir R. S. in fee;" in this case it was
 determined by the opinion of the Judges, that
 the estate should vest in the first person, who

Cas Temp.
 Talb. 228

2 P. W. 618.
Stanley v.
Leigh.

Barnardist.
Rep. in Chan.
54.
Gower v.
Grosvenor.

should come in being, or live to take under the words of any of these limitations, and that until some one of the limitations should become vested, none of the subsequent ones would be void, and therefore if no son of the testator's daughter *M. S.* by her husband *T. S.* should live to attain 21 years of age, nor any daughter be born to take under those limitations, in that case the estate would vest in the remainder man *Sir R. S.*—So where a testator devised a term in trust for *A.* for life, remainder to his first and other sons in tail successively, remainder to his daughters, and in default of daughters, or in case of their deaths before the age of 21, remainder to *B.* for the residue of the term. *A.* died without ever having had a son or daughter, and it was adjudged that the remainder over to *B.* was good and vested—And where there was a limitation of an estate to *A.* for life, remainder to his first and other sons in tail, remainder over, with a clause that the plate, furniture, &c. in a certain mansion-house should go accordingly as his estate was settled, as far as it might by law, *A.* died without issue, and Lord *Hardwicke* argued, that the first contingency never having taken place, the limitation of the furniture over was good by the event; but without delivering a decisive opinion upon the point, he declared, that in the reason of the thing there seemed to him to be a great difference between such sort of limitations *vested*, and the like limitations when *contingent*; as if a personal estate be bequeathed to *A.* for life, the remainder to *B.* and the heirs-male of his body (supposing *B.* a person *in esse*) remainder to *C.* the whole remainder in that case is vested in *B.*, and *C.* can never under that limitation

limitation come in for any part of it, but if the first remainder were contingent in its creation, then the remainder over to C. would be good or bad, according to the event of the contingency; that is, if a limitation which would have been a contingent remainder in case of a real estate, should become vested during the life of any of the tenants for life, or if a posthumous child should be born who would have had the benefit of the remainder, if it had been within the statute of *W. III.* then the remainder over would be bad in event; but if no such contingency should happen then it would be good.

Vide further,
1 Vern. 304.
Massenburg
v. Ash 1 Salk
156. Higgin
v. Derby. 1.
P. W. 98.
Higgins v.
Dowler. 2 P.
W. 421. Mac-
dox v. Staines.
3 P. W. 300.
Stadholt v.
Hodgson,
ibid. 306.
Green v.
Ekins. 3 Atk.

And though in the case of *Clare v. Clare*, 287.
(*Cas. Temp. Talb.* 21.) Lord *Talbot* seems to have been of a contrary opinion, yet the above case of *Stephens v. Stephens*, determined afterwards by the same Chancellor, upon the certificate of the Judges, and the uniform tenor of subsequent resolutions, the principal of which I have cited in the margin, appear now to have settled the law in that manner.

In all the foregoing cases we may observe, that a subsequent limitation was not considered as a limitation *upon* a preceding, and to take effect after it, but only as an alternative to it, and to take effect only in case the preceding should fail and never take effect at all. It follows, that if the one was not too remote in its creation, the other could not be so, being to take effect at the time limited for the first, or else not at all. Therefore we must distinguish between instances of this kind, and those cases wherein either the preceding limitation is vested, or there is no preceding limitation at all; for in either of such cases the future limitation can-

not be merely an alternative, but is absolutely limited to take effect either after the expiration of the preceding limitation, or else (if there be no preceding limitation) upon the happening of some future event. And therefore if the expiration of that preceding limitation, or that future event be of too remote a nature, the future limitation is void in its creation, and no subsequent accident can make it good; because it was not (as in the former cases) limited to take effect or to fail upon the event of a contingency, which must be determined one way or other within the period allowed by law for the vesting of an executory devise, but was limited absolutely to take effect on an event which probably might not happen within such a period. Thus although in the case of a devise of lands in fee to the first son of *A.* who shall attain 21 years of age, and in default of such issue remainder to *B.* in fee; such remainder would fail, or take effect accordingly as the first limitation should vest or not; yet if a devise be to the *heirs-male* of the body of *C.* and in default of such issue remainder to *D.* in tail; here if we suppose the first limitation void, the subsequent one is an absolute future limitation to take effect after a dying without issue; and therefore though no heirs-male of the body of *C.* should ever exist, such event will not make good the limitation to *D.* which was too remote in its creation, and could not be considered (as in the former case) merely as an alternative to a preceding limitation.

Vide *Caf.*
Temp. Talb.
245. *Saberton*
v. Saberton

Vide 2 *Bur-*
row 878.

I have before shewn that whenever a contingent limitation is preceded by a freehold capable of supporting it, it is construed a contingent remainder, and not an executory devise; but it
is

is possible that the freehold so limited, may by subsequent accident become incapable of ever taking effect at all, (as by the death of the first devisee in the testator's lifetime), in which case the subsequent limitation, if the contingency has not then happened, will be in the same condition at the testator's death (that is at the time when the will is to take effect) as if it had been limited without any preceding freehold; now in this case it has been held that where such subsequent contingent limitation could not vest at the testator's death, it should enure as an executory devise, rather than fail for want of that preceding freehold which had never taken effect.

As where *A.* devised lands to trustees in trust for *B.* for life, and after his decease for the first and other sons of *B.* successively in tail-male, remainder to the future sons of *C.* for life successively, with divers mean remainders, remainder over to *D.*; *B.* died without issue in the lifetime of the testator, and afterwards the testator died before any of the contingent remainders were vested; the question was, Whether the mean contingent remainders were not become void, there being no preceding estate to support them, for if so then would the whole have been vested in possession in *D.*? and it was held they should enure by way of executory devise; and a son being afterwards born to *C.* it was held that the executory devise having thereby once vested, the subsequent limitations thereupon, became contingent remainders, and though such son afterwards died before the subsequent limitations vested, yet were they not destroyed, because it was held, that the inheritance vested in the trustees was as sufficient to support them, as if

Caf. Temp.

Talb. 44.

Hopkins v.

Hopkins.

1 Vezey 268.

Hopkins v.

Hopkins.

1 Atk. 581.

there

there had been estates limited for that particular purpose.

Vide Carth.

310. Reeve

v. Long.

4 Mod. 258.

2 Saund. 380.

2 Vezey 616.

But when a preceding freehold has once vested, no subsequent accident will make a contingent remainder enure as an executory devise.

It has been held that where an executory devise is limited, *per verba de presenti*, that is, where the devisee is mentioned as a person in present existence, and the commencement of the estate devised is not expressly deferred to a future period, there the devisee must be a person capable at the death of the devisor, or otherwise the devise will be void; as if one devise (in the first instance) to the heir of J. S. and J. S. is living at the death of the testator, it is said the devise shall not be construed an executory devise, and therefore must be void; but that if it were to the heir of J. S. after the death of J. S. that would be clearly good as an executory devise, because a future time is mentioned. So it has been said that a devise to the first son of A. having none at that time is void; but if it were to the first son of A. when he shall have one, it would be good: though *Bridgman* Ch. J. said that a devise to J. S. for 15 years, remainder to the *right heirs* of J. D. is not good, but that a devise to one for 15 years remainder to the *first son* of J. D. is good; because the devisor takes notice that J. D. hath not a son and intends a future act.—I don't find any case determined upon this distinction. For in the two cases I have cited, the judgments did not depend altogether upon that point. In the first the limitation was to A. for 50 years if he should so long live, remainder to the heirs-male of A.; the court, upon the distinction I have mentioned,

were

1 Salk. 226.

Goodright v. Cornish.

Ibid. 229.

Scatterwood

v. Edge.

Raym. 83.

were of opinion that this devise to the heirs-male was not a good executory devise; but whatever it was in its creation they held it became void in event, for *A.* died without issue, so that whether it was originally void was no direct point of their decision; the like observation may be made with respect to the other case where a limitation was to trustees for 11 years, and then to the first son of *B.* (then unborn) it was there said upon the same principle, that this limitation should not enure as an executory devise to the first son of *B.* because limited *per verba de presenti*; but, however, since *B.* died without issue, it became void in event whatever it was in its creation, therefore I apprehend the judgment did not decide that point.

Indeed in the cases of *Moor v. Parker*, and of *Goodman v. Goodright* cited in a former page, Vide sup. page 134. the court seemed to hold the devises to the issue of the body of a man by a future wife, and to the heirs of the body of a woman by a future husband to be void. But it is obvious, neither of those cases decided the point in question: for the opinion of the court respecting the validity of the limitations in those cases, could not proceed from the distinction I am speaking of; because a devise to the issue by a future wife or husband, as much implies the testator's knowledge that such issue does not yet exist, and is as strongly expressive of a future time, as the case put and admitted by the court (*Salk.* 226.) of a devise to the heirs of *J. S.* after the death of *J. S.* —In the infancy of executory devises, before their limits were clearly ascertained and established, and whilst they were scarcely yet distinguished from limitations in conveyances at common law

Caf. Temp.
Talbot. 145.
150. Chapman
v. Blisset.

1 Will. 225.
Doe v. Carle-
ton.

law, there is no wonder that a distinction of this nature should have been taken ; but even then it seems to have been grounded upon, and directed by the evidence of the testator's intention, as appears in the several cases put by the court in the places above cited, from *Salkeld* and *Raymond*. And indeed in the case of a future limitation, to the unborn children of the testator's grandson, Lord *Talbot* thought its being limited *per verba de presenti* no objection to its taking effect as an executory devise, where the intention was clearly future ; so where a testator devised to his wife for 3 years, remainder to his son for 99 years, if he should so long live, remainder to him for 99 years, if such wife as he should marry should so long live ; remainder to the *heirs* of his son's body, and their heirs of their bodies ; the court held the devise to the *heirs* of the son's body good, as an executory devise, being to take place *in futuro*, within the compass of a life in being—From which cases I think we may infer, that whatever force is to be allowed to the distinction between executory limitations *per verba de presenti* and *per verba de futuro*, it can only affect those cases, where there is not the least circumstance to indicate the testator's contemplation or intention of any thing else than a present immediate devise.

1 Lev. 135.
Snow v. Cut-
ler.

1 Freem. 293.
2 Freem. 248.
Taylor v.
Biddal.

It was formerly disputed, Whether a devise to an infant in *ventre sa mere* was good or not ? some held that it was not, upon the principle I have been mentioning, whilst others contended that it was : but all agreed, that a devise to an infant *when he should be born* was good. But the law it seems is now clear, that a devise to an infant in *ventre sa mere* is good enough, though

though he be born after the testator's death, *per North, Ch. J.*

It is a rule, that wherever there is an executory devise of a real estate, and the freehold is not in the mean time disposed of, the freehold and inheritance descend to the testator's heir at law. As where the testator devised lands to *A.* for five years from *Michaelmas* then next, remainder to *B.* in fee, and died before *Michaelmas*, it was held that the freehold and fee-simple descended to the heir at law till *Michaelmas*. So where *A.* seised in fee, devised to *B.* in fee, to commence six months after *A.*'s death, during those six months the estate descended and continued in the heir at law. And where a testator seised in fee devised to trustees for 500 years, remainder to the first and other sons of *B.* in tail, (and *B.* had no son born at the testator's death) remainder over in fee, it was held, that the freehold descended to the heir at law till the birth of a son to *B.*, or till his death, without having had a son.

Cro. El. 878.
Pay's case.

1 Lutw. 313.
Clerk v. Smith.

2 P. W. 28.
Gore v. Gore.

So where there is a preceding estate limited with an executory devise over of the real estate, the intermediate profits between the determination of the first estate and vesting of the limitation over will go to the heir at law, if not otherwise disposed of. As where a testator devised to *A.* for life, remainder to the future sons of *B.* successively, remainder over, and the testator provided for the disposition of the rents and profits during the minorities of those who were to take in future; *A.* died in the lifetime of the testator, it was decreed the contingent limitations should enure as executory devises, and that the profits from the death of the testator till the birth of a son of *B.* should go to the heir at law; and afterwards a son being born to *B.* upon the

Cas. Temp.
Talb. 44.
Hopkins v. Hopkins.

1 Vez. 268.
1 Atk. 581.
Hopkins v.
Hopkins.

the death of that son it was decreed, that the rents and profits should belong to the heir, until some other person should become intitled under the limitations in the will.

Caf. Temp.
Talb. 228.
Stephens v.
Stephens.

But a devise of all the *rest and residue* of the *real* estate will pass as well the profits from the testator's death to the time of the estate's vesting, as from the determination of the first estate to the vesting of a subsequent. As where a testator devised an estate to his grandson *B.* in fee, and if he should die before the age of twenty-one, then to such other grandson then unborn as should attain the age of twenty-one, remainder over to *C.*; *B.* died under age, and it was decreed, by advice of the judges, that the intermediate profits between the death of *B.* and the vesting of the estate by virtue of any of the subsequent limitations, passed to *C.* by force of the residuary devise, as an interest in the real estate not otherwise disposed of. So where the testator devised all the *rest and residue* of his real and personal estate of what nature or kind soever, to such child or children, as his daughter should have; it was held that the profits from the testator's death to the birth of a child of his daughter, should pass under the devise.

1 Vez. 485.
Rogers v.
Gibson.
And vide 1
Vezey 122.

So likewise in the case of an executory devise of a personal estate, the intermediate profits, either before the estate is to vest or between the determination of the first estate and the vesting of a subsequent limitation, will pass by virtue of a residuary devise. As where the testator devised his estate real and personal upon trust, to pay his son *B.* a certain annuity, and gave all the *rest and residue* of the yearly rents of the *said trust-estate* to be applied during the life of his son *B.* to the education and *benefit* of the future children

Caf. Temp.
Talb. 145.
Vide also
1 Vez. 485.

dren of his said son, and after *B.*'s death one moiety of the *said trust-estate* to the said children, and the other moiety to somebody else, it was decreed, that the profits, from the testator's death to the birth of a child of *B.* should go entirely to *B.*'s children.

But where there is no residuary devise, or other particular disposition of them, it seems the profits of a personal estate between the death of a testator and the vesting of an executory estate, or between the determination of the first limitation, and the vesting of a subsequent one, will accumulate for the benefit of the person next to take by virtue of the limitations. As where a testator devised a share in a brewery to an infant, provided that infant should attain the age of twenty-one years, but if he should die before that age, then to *B.* it was decreed, that the profits from the testator's death until the infant should attain the age of twenty-one, should belong to the infant on his attaining such age. The infant died before that age, and it was decreed, that the intermediate profits belonged to *B.* and not to the infant's administrator. So where a testator devised a personal estate to *A.* an infant, and if *A.* should die before twenty-one, and his mother should have no other child then to *B.*; *A.* died during his infancy, and it was decreed, that the rents and profits, from the death of *A.* till the contingency should happen, were to accumulate and be added to the capital, and if *A.*'s mother should have no other child, they should go to *B.*

In cases of contingent or executory interests, the court of Chancery will interfere in behalf of the persons intitled to such interests to prevent unreasonable waste being committed by the tenants

Barnsdiff.
Rep. in Chan.
74. Atkinson
v. Turner.

3 P. W. 300.
Studholm v.
Hodgson.
And vide
1 Vez. 521.

1 Eq. Abr.
400.

tenants in possession, as appears in the case of *Dayrell and Champness*. The court has even gone so far as to decree a restitution of the value to a contingent remainder-man, for waste committed before the contingency happened, by the tenant in possession in collusion with the person intitled to the inheritance in remainder. As where *A.* being tenant for 99 years determinable on his life, without impeachment of waste except voluntary, remainder to trustees to support contingent uses, remainder to the first and other sons of *A.* successively in tail, remainder to *B.* in fee; *A.* having no son then born, agreed with *B.* to fell timber and divide the profits; a son was afterwards born, and Lord *Hardwicke* decreed that the son should recover against the representatives of *B.*

1 Vezey 524.
546.
Garth. v. Sir
John Hind
Cotton.

Vide supra,
page 122.

Cas. Temp.
Talb. 117.
King v.
Withers.

There still remains another property of executory devises to be taken notice of; which belongs to them in common with contingent remainders; what I mean is, that an executory interest is transmissible to the representative of the devisee, when such devisee dies before the contingency happens. As where the testator devised land to his son *B.*, but if he should die without issue-male of his body then living, or which might be afterward born, that then his daughter should receive at her age of 21, or day of marriage which should first happen, the sum of 3500*l* (over and above a portion before bequeathed her) but in case the contingency of his said son's dying should not happen before his daughter's said age or day of marriage, that then she should receive that sum whenever such contingency might happen, and charged the said legacy or portion on the real estate. The daughter married, having attained her

her age of 21, and died in the lifetime of her brother *B.*, who afterward died without issue-male: Lord *Talbot* decreed that the legacy should be raised, for the benefit of the administrator (the husband) of the daughter: and he held that though it did not absolutely vest, because it might never arise, yet it so far vested as to be transmissible to the representative. This decree was afterwards affirmed in the House of Lords. — So where a testator devised to *A.* and his heirs, and if *A.* should die before 21, then to *B.* and his heirs: *A.* died before 21, but *B.* died before him. The question was, whether *B.*'s heirs should take, It was objected, that the limitation to *B.* upon *A.*'s dying before 21, was but an *executory devise*, and that such devises have always been construed as possibilities only. But the court held clearly, that although *B.* died in the lifetime of *A.* yet *B.*'s heirs might well take under the *executory* devise; as such devise was to be considered equivalent in point of interest, to a contingent remainder, and consequently transmissible. — And Lord *Hardwicke* in the case of *Chauncy v. Graydon* (2 *Atk.* 616.) determined accordingly; for (said he) where either real or personal estate is given upon a contingency, and that contingency does not take effect in the lifetime of the devisee; yet if real *his heir*, and if personal *his executor* will be intitled to it: for though in law a possibility is not assignable, yet in equity, where it is done for a valuable consideration, it has been held to be assignable, and transmissible to the representative of devisee. *Vide Higden v. Williamson.* 3 *P. W.* 132. and *vide* 2 *P. W.* 608.

P. W. 414

Vin. v 8 p.

112. ca. 38.

Gurnel v.

Wood.

And vide

1 *P. W.* 566.

Finbury v.

Elsin 2 Willf.

29. Good-

right v. Searle.

1 *Vezey* 47.234. 2 *Vezey*

118, 119.

N

And

1 Burrow
228. Good-
title v. Whit-
by, and vide
3 Rep. 19
Boraston's
case. Palmer
132. and su-
pra, page 131.

And lastly, I shall observe, that where an absolute property is given, and a particular interest in the mean time until devisee comes of age, and then the property to him ; such limitation is not to operate as a condition precedent, and so create an executory devise ; but as a description of the time when the devisee is to have possession. As where a testator devised lands to two trustees, and the survivor of them and his heirs, in trust to lay out the rents and profits for the maintenance of two nephews of the testator, during their minorities ; and when, and as they should attain their respective ages of 21 years, to be and remain to those two nephews and their heirs equally : here it was adjudged that the nephews took immediately, and that the limitation to the trustees was but a chattel interest out of the freehold in the nephews.

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